

OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

STERN PRODUCE COMPANY, INC.	Case No. 28-CA-163215
	28-CA-166351
and	28-CA-168680

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

GENERAL COUNSEL EXHIBITS

Place: Phoenix, Arizona

Dates: September 09, 2016

OFFICIAL REPORTERS

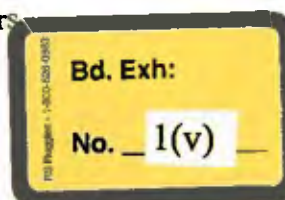
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7227 North 16th Street, Suite 207
Phoenix, AZ 85020
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

Re: Stern Produce Company, Inc
Case 28-CA-163215, et al.

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

General Counsel Exhibit	1(a) Charge Against Employer in Case 28-CA-163215, dated November 3, 2015.
	1(b) Affidavit of Service for 1(a), dated November 3, 2015.
	1(c) Charge Against Employer in Case 28-CA-166351, dated December 18, 2015.
	1(d) Affidavit of Service for 1(c), dated December 21, 2015.
	1(e) Charge Against Employer in Case 28-CA168680, dated January 29, 2016.
	1(f) Affidavit of Service for 1(e), dated January 29, 2016.
	1(g) First Amended Charge Against Employer in Case 28-CA-166351, dated January 29, 2016.
	1(h) Affidavit of Service for 1(g), dated January 29, 2016.
	1(i) Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, dated July 19, 2016.
	1(j) Affidavit of Service for 1(i), dated July 19, 2016.
	1(k) Answer to Consolidated Complaint and Notice of Hearing, dated July 25, 2016.
	1(l) Amendment to Consolidated Complaint, dated August 19, 2016.
	1(m) Affidavit of Service for 1(l), dated August 19, 2016.
	1(n) Amended Answer to Consolidated Complaint and Notice of Hearing, dated August 22, 2016.
	1(o) General Counsel's Motion for a Bill of Particulars, dated August 25, 2016.



- 1(p) Answer to Amended Consolidated Complaint and Notice of Hearing, dated August 29, 2016.
- 1(q) General Counsel's Motion to Strike Respondent's Fourth Affirmative Defense, dated August 31, 2016.
- 1(r) Respondent's Response to General Counsel's Motion to Strike Fourth Separate Defense, dated August 31, 2016.
- 1(s) Order Denying General Counsel's Motion for a Bill of Particulars, dated September 1, 2016.
- 1(t) Notice of Intent to Amend Consolidated Complaint, dated September 2, 2016.
- 1(u) Affidavit of Service of 1(t), dated September 2, 2016.
- 1(v) Index and Description of Formal Documents

EXHIBIT NO. GC(W) RECEIVED ☒ REJECTED ☐

CASE NO. 28CA 163215 CASE NAME: STERN Produce

NO. OF PAGES: 3 DATE: 9/6/16 REPORTER: D R

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 99**

**Cases 28-CA-163215
28-CA-166351
28-CA-168680**

**AFFIDAVIT OF SERVICE OF: NOTICE OF INTENT TO AMEND CONSOLIDATED
COMPLAINT**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 2, 2016, I served the above-entitled document(s) by U.S. mail and Email, as noted below, upon the following persons, addressed to them at the following addresses:

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United Food And Commercial Workers
Union, Local 99
2401 North Central Avenue
Phoenix, AZ 85004-1331

9/2/16

Nancy E. Martinez,
Designated Agent of NLRB

Date

Name

/s/ Nancy E. Martinez

Signature

Bd. Exh:

No. 1(u)

EXHIBIT NO. GC (u) RECEIVED ☒ REJECTED ☐

CASE NO. 28A163215 CASE NAME: STERNA Products

NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: JR

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**Cases 28-CA-163215
 28-CA-166351
 28-CA-168680**

**NOTICE OF INTENT TO AMEND
CONSOLIDATED COMPLAINT**

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, at the outset of the hearing in the above-captioned cases, the General Counsel will amend the Consolidated Complaint and Notice of Hearing, which issued on July 19, 2016, and the Amendment to Consolidated Complaint, which issued on August 19, 2016, by adding paragraph 5(v), and its subsections, as follows:

5. (v) About July 8, 2016, Respondent, by a letter addressed to employees:
- (i) blamed the Union for preventing it from making changes to employees' wages, benefits, and working conditions; and
- (ii) represented to employees that the Union would file unfair labor practice charges against Respondent if it provided a wage increase to employees.

Dated at Phoenix, Arizona, this 2nd day of September, 2016.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

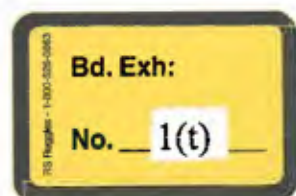


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CASE NO. 28CA163215 CASE NAME: STERN Produce
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: DD

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 28-CA-163215, et al.

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

STERN PRODUCE COMPANY, INC.

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

Cases 28-CA-163215
28-CA-166351
28-CA-168680

**ORDER DENYING GENERAL COUNSEL'S
MOTION FOR A BILL OF PARTICULARS**

This matter is before me on the General Counsel's Motion for a Bill of Particulars. For the reasons set forth below, the Motion is DENIED.

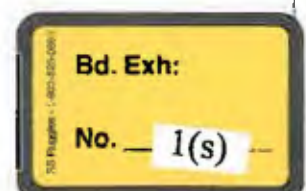
On July 19, 2016, the Regional Director for Region 28 (Regional Director) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. The consolidated complaint alleges that Stern Produce Company, Inc. (Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it made multiple threats, promises of benefits and unspecified reprisals to employees, interrogated employees, interfered with a Board investigation and failed to recognize the Union.

On July 25, 2016, Respondent filed an Answer to the consolidated complaint. In the answer, Respondent set forth eight affirmative defenses. At issue here are Respondent's fifth and sixth affirmative defenses. Respondent's fifth separate defense stated that "the complaint is barred by the doctrine of unclean hands." Respondent's sixth separate defense states that "Respondent was denied due process." See R. Answer, at 5.

On August 25, 2016, the General Counsel moved for a bill of particulars regarding Respondent's fifth and sixth separate defenses, arguing that those defenses, as written, are conclusory, unsupported and lacked sufficient details in order for counsel for the General Counsel to prepare and respond to them at the hearing. In response, on August 29, 2016, Respondent amended its Answer to the Consolidated Complaint and Notice of Hearing.¹

A bill of particulars is warranted when a complaint, or in this case, an affirmative defense is so vague that the party charged is unable to meet its case. See *North American Rockwell Corp v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968). An affirmative defense may be stricken if it is not a recognized affirmative defense in law or is irrelevant to the issues set for hearing. See *TNT Logistics, North America*, 346 NLRB 1301 fn. 1 (2006), *enfd.* 246 Fed. Appx. 220 (4th Cir. 2007)(unpub). If the defense is insufficiently detailed, it also

¹ Respondent entitled its pleading "Answer to Amended Consolidated Complaint and Notice of Hearing." However, the Consolidated Complaint has not been amended since it was filed on July 19. Thus, I believe the title of Respondent's Answer was simply an inadvertent typographical error.



may be stricken if it is introduced so that the party charged must engage in a "fishing expedition" to discover the evidence needed to support the defense. See *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011).

In its Amended Answer, Respondent's fifth separate defense, which originally alleged that the complaint denied it due process, is now contained in Respondent's fourth separate defense. However, Respondent new fourth separate defense set forth with more specificity why it believes the consolidated complaint denied it due process. With this clarification, I find that the defense alleged is sufficiently detailed and particularized so as to not prejudice counsel for the General Counsel in its trial preparation.

Respondent's new fifth separate defense now states, "The complaint seeks remedies beyond the Board's statutory authority." Further clarification of this defense is found earlier in Respondent's Answer at paragraph 10, which states:

In response to the proposed remedies set forth in the Complaint, Respondent denies that General Counsel or Charging Party are entitled to any relief, much less the extraordinary remedies set forth in the Complaint. Respondent affirmatively states that the remedies requested are otherwise unwarranted and beyond the Board's authority. See R. Am. Answer at 4.

Again, I find Respondent's new fifth separate defense is now pled with sufficient particularity so as to not prejudice counsel for the General Counsel.

Respondent's sixth separate defense, which previously alleged that the complaint was barred by the doctrine of unclean hands, now states:

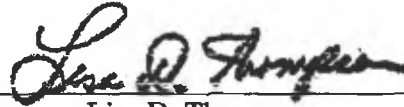
Respondent relies on all proper defenses lawfully available that may be disclosed by the evidence in the instant case and reserves the right to amend this pleading to state such other defenses and/or to otherwise supplement this pleading upon discovery of facts or evidence rendering such action appropriate.

This defense does not require a response on the part of the counsel for the General Counsel. However, even assuming it did, I find that the defense is sufficiently detailed and does not prejudice the General Counsel's case.

Accordingly, for the reasons set forth above, the General Counsel's Motion for a Bill of Particulars is DENIED.

EXHIBIT NO. G51(5) RECEIVED ☒ REJECTED ☐
CASE NO. 28CA 163215 CASE NAME: Stern Produce
NO. OF PAGES 4 DATE 9/6/16 REPORTER: PSL

Date: September 1, 2016, San Francisco, California



Lisa D. Thompson
Administrative Law Judge

Served via facsimile upon the following:

For the General Counsel:

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NLRB – Region 28

For the Respondent Stern Produce:

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Davis Cowell & Bowe

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**Case 28-CA-163215
28-CA-166351
28-CA-168680**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**RESPONDENT'S RESPONSE TO GENERAL COUNSEL'S
MOTION TO STRIKE FOURTH SEPARATE DEFENSE**

Stern Produce Company, Inc. ("Respondent" or "Stern"), by and through its attorneys Sherman & Howard L.L.C., pursuant to Sections 102.23 and 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB"), hereby responds to General Counsel's Motion to Strike Respondent's Fourth Separate Defense ("Motion") as follows:

While Respondent agrees that the investigation into the above referenced charges may have been affected by inappropriate disregard of credible evidence and possible misconduct, its Fourth Separate Defense is not based on any misconduct in the investigation.¹ Rather, the Fourth Separate Defense is a direct reference to the vague and conclusory allegations in the Complaint and is meant to preserve Respondent's right to challenge alterations in the theory of violations

¹ The reference to possible fabrication of allegations was indeed a reference to conduct in the course of the investigation. Respondent agrees that any such misconduct is not currently before the Administrative Law Judge. Respondent nevertheless reserves its right to cross examine all witnesses regarding their prior statements and any conduct by any person that may have affected prior testimony or testimony before the Administrative Law Judge.

Bd. Exh:

No. (r)

that unfold in the course of trial. Given Counsel for the General Counsel's zeal to strike the due process defense, it seems that Respondent's preservation of the argument is warranted.

In NYP Holdings, Inc., 353 NLRB 343, 344 (2008), the Board stated:

The Board has indicated that "[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted). In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory. See generally *Sierra Bullets, LLC*, 340 NLRB 242, 242-243 (2003) (violation based when General Counsel expressly litigated case on narrow theory).

Clearly, the Board did not intend to limit that case to its specific facts. The Board was discussing the general requirements of due process. Although Counsel for the General Counsel agrees that NYP Holdings, Inc. is the relevant precedent, he claims that it "is entirely inapplicable at this stage of the proceedings." Motion at 4. That is, Counsel for the General Counsel concedes that Respondent has a right to raise due process, but contends Respondent must wait until the *Administrative Law Judge* has violated Respondent's due process rights. Motion at 5.

This interpretation of "due process" suggests that the General Counsel is free to alter its theory of violations mid-stream, exceed the scope of the Complaint, and/or otherwise 'hide the ball' from Respondent. Such an interpretation is directly contrary to NYP Holdings, Inc.

Counsel for General Counsel apparently also contends that the failure to specify any date for over 35 allegations that are the alleged basis for extraordinary remedies (including the denial of the right to vote) provides Respondent sufficient due process. Respondent respectfully disagrees that the Complaint sufficiently advises Respondent of General Counsel's theory of violations. While Counsel for the General Counsel evidently embraces a 'notice pleading'

EXHIBIT NO. EC1(R) RECEIVED ☒ REJECTED ☐
CASE NO. 28CA163215 CASE NAME: Stern Producer
NO. OF PAGES: 8 DATE: 9/6/16 REPORTER: DL

standard for the Complaint, he demands that Counsel for Respondent provide a thorough recitation of all bases for any asserted separate defense. In a recent case before Administrative Law Judge Geoffrey Carter, the General Counsel similarly sought to strike a due process defense and Judge Carter denied the Motion, indicating that the respondent in that matter was “within its rights to plead” the defense. See excerpt of transcript in Case No. 27-CA-140724, et al., attached hereto as Exhibit “A”.

Respondent merely requests the same consideration in the instant matter. Accordingly, Respondent requests that General Counsel’s Motion to Strike be denied.

Respectfully submitted this 31st day of August 2016.

s/ John Alan Doran

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2016, a true and correct copy of the foregoing **RESPONDENT'S RESPONSE TO GENERAL COUNSEL'S MOTION TO STRIKE** was E-filed with the NLRB E-Filing System and served via Federal Express, postage/delivery prepaid, to the following:

Honorable Gerald M. Etchingham e-filed
Associate Chief Administrative Law Judge
NLRB – Division of Judges
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Cornele Overstreet e-filed
Regional Director
National Labor Relations Board
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Fernando Anzaldua, Esq. e-filed
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Sandra Lyons, Esq.
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s/ Lori Hinkel_____

EXHIBIT A

EXHIBIT A

OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 27

In the Matter of:

Colorado Symphony
Association,

and

Case No. 27-CA-140724
27-CA-155238
27-CA-161339
27-CA-179032

American Federation of
Musicians of the United
States and Canada, AFL-
CIO/CLC,

Place: Denver, Colorado

Dates: August 15, 2016

Pages: 1 through 180

Volume: 1

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1 welcome to object and then we can address that as that comes
2 up.

3 MR. SCULLY: Thank you, Your Honor.

4 JUDGE CARTER: So for the record, that petition to revoke
5 is denied, but then obviously counsel can object as need be.

6 And there was also the General Counsel's motion to strike
7 certain of Respondent's affirmative defenses. And as I
8 mentioned off the record in a conference call we had a few days
9 ago, that motion will be denied. As a pleading, Respondent was
10 within its rights to plead various defenses, including ones
11 that General Counsel objected to. And I think we'll see how
12 that plays out in terms of what they can offer by way of
13 evidence to prove those up. That certainly as a matter of
14 pleading, they are within fair bounds to plead them. So that
15 motion is denied.

16 Anything else before we start with opening statements?

17 MR. FRUEND: Nothing from Charging Party.

18 MS. DEVITT: Nothing from General Counsel.

19 MR. SCULLY: Nothing from Respondent, Your Honor, thank
20 you.

21 JUDGE CARTER: Okay. All right, we'll start with the
22 General Counsel. You're opening.

23 MS. DEVITT: Your Honor, this case boils down to the
24 Employer, Colorado Symphony Association, taking an escape from
25 its bargaining obligations with both of the longstanding

**UNITED STATES OF AMERICA.
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**Cases 28-CA-163215
 28-CA-166351
 28-CA-168680**

**GENERAL COUNSEL'S MOTION TO STRIKE
RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE**

Pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel (CGC) moves to strike the fourth affirmative defense advanced by Stern Produce Company, Inc. (Respondent) in its Answer to Amended Consolidated Complaint and Notice of Hearing (Answer).¹

In its fourth affirmative defense, Respondent alleges:

Respondent was denied due process under NYP Holdings, Inc., 353 NLRB 343 (2008), in view of General Counsel's failure to provide a clear statement of the allegations and theory against Respondent, failure to provide Respondent a fair opportunity to respond to allegations asserted by Charging Party, and repeated alteration of its purported theory of liability.

Respondent does not specify in its Answer whether it is asserting that it has been denied due process in the unfair labor practice proceedings initiated by the issuance of the Consolidated Complaint and Notice of Hearing, and the limited Amendment thereto, in this matter (the Complaint), or was denied due process during the preliminary investigation preceding the issuance of the Complaint. In either case, there is no basis for Respondent's defense.

¹ It is noted that the Regional Director did not issue an Amended Consolidated Complaint, but, rather, a very limited Amendment to the Consolidated Complaint. However, Respondent's Answer appears to respond to the allegations of the Consolidated Complaint, as amended by the limited Amendment. Given Respondent's filing of the Answer, which omits one of the affirmative defenses that was the subject of the General Counsel's Motion for a Bill of Particulars dated August 25, 2016, and changes the other affirmative defense that was the subject of that Motion, the General Counsel hereby withdraws the Motion.

Bd. Exh:

No. 1(q) —

If Respondent's affirmative defense is intended to allege a denial of due process in the unfair labor practice proceedings initiated by the issuance of the Complaint, it fails because Respondent has been afforded due process through issuance of the Complaint, and through the scheduling of a hearing concerning the allegations of the Complaint, at which it will be afforded the opportunity to present its evidence, including by calling and cross-examining witnesses. The Board has long held that the issuance of a complaint and conduct of an evidentiary hearing afford respondents in unfair labor practice proceedings due process.² Respondent makes no explicit claim that the Complaint fails to comply with the requirements of Section 102.15 of the Board's Rules and Regulations, or that the Complaint does not give it sufficient notice of the allegations against it. Indeed, there can be no question that, as required under Section 102.15 of the Board's Rules and Regulations, the Complaint, contains:

- (a) A clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and
- (b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

If Respondent's affirmative defense is intended to allege a denial of due process during the preliminary investigation preceding the issuance of the Complaint,³ it fails because, as explained above, Respondent has been afforded due process through the issuance of the Complaint and the scheduling of the hearing, and, as the Board has held repeatedly, the adequacy of the General Counsel's investigation is not a matter to be litigated at an unfair labor practice hearings, and due process claims are tested by analysis of the complaint allegations, and not by

² See *Redway Carriers*, 274 NLRB 1359, 1371 (1985); *Coastside Scavenger Co.*, 273 NLRB 1618, 1627 (1985).

³ It is noted that, in a pre-hearing telephone conference with the Administrative Law Judge and in a voicemail message left for Counsel for the General Counsel, Respondent's Counsel suggested that its affirmative defense is, in fact, based on a claim of a denial of due process during the General Counsel's preliminary investigation.

EXHIBIT NO. G-1 (g) RECEIVED 138 REJECTED _____
CASE NO. 28 CA 163215 CASE NAME: STEVEN Produce
NO. OF PAGES: 7 DATE: 9/6/16 REPORTER: JD

an analysis of the investigation.⁴ Accordingly, it is clear that deficiencies in the investigation of a charge do not bar proceedings at the adjudicatory stage. As the Board stated in *Redway*

Carriers, paraphrasing a decision of the Seventh Circuit Court of Appeals:

[T]he adequacy of the preliminary investigation is administratively tested, not by an investigation of the investigation, but by the General Counsel's ability in an open hearing to demonstrate by a preponderance of the credible evidence that the respondent has engaged in the unfair labor practices alleged in the complaint.⁵

Similarly, the Division of Judges Bench Book states that the underlying investigation may not be litigated in the unfair labor practice trial:

§3-730 Inadequate Investigation/Compliance with Casehandling Manual Due process claims are tested not by analysis of the investigation, but by analysis of complaint allegations. Therefore, the adequacy of General Counsel's investigation may not be litigated in the unfair labor practice trial. *Redway Carriers*, 274 NLRB 1359, 1371 (1985). See also *Laborers Local 135 (Bechtel Power Corp.)*, 301 NLRB 1066, 1068 n. 19 (1991) (citing same rule in compliance proceeding).⁶

Thus, to the extent that Respondent's affirmative defense is an attempt to allow it to derail the unfair labor practice hearing into an immaterial inquiry about the General Counsel's investigation, rather than a hearing on the merits of the allegations of the Complaint, it should be summarily rejected. Although Respondent may wish to use the unfair labor practice hearing as a stage for continuing to pronounce baseless and inflammatory claims about alleged conduct of agents of the General Counsel during the investigation, the conduct of the investigation simply is

⁴ See, e.g., *Redway Carriers*, 274 NLRB 1359, 1371 (1985) (finding that the scope, conduct or extent of the preliminary investigation are not matters relevant to or material for consideration on the issues to be adjudicated at hearing); *Coastside Scavenger Co.*, 273 NLRB 1618, 1627 (1985) (rejecting a "due process issue" and finding that respondent had due notice of the charges against it and had the opportunity to appear at the hearing, present evidence, and be fully heard); *Dairylee*, 149 NLRB 829, 830 fn. 1 (1964) (finding that compliance with the Board's Statement of Procedure in a complaint case is not a jurisdictional requirement) (internal cites omitted).

⁵ *Id.*

⁶ Division of Judges Bench Book, Section 3-730.

not at issue in the unfair labor practice hearing.⁷ What is at issue is Respondent's conduct, as alleged in the Complaint.

The case cited in Respondent's affirmative defense, *New York Post*,⁸ is entirely inapplicable at this stage of the proceedings. *New York Post* does not stand for the proposition failure to provide a clear statement of allegations, failure to provide an opportunity to respond, or alteration of the theory of liability during the General Counsel's preliminary investigation amounts to a denial of due process. Rather, in that case, the Board found that the General Counsel's the theory of the alleged violation articulated by the General Counsel in the complaint and on the record at the unfair labor practice hearing was different from the theory that formed the basis for the administrative law judge's finding of an unfair labor practice.⁹ Specifically, the General Counsel alleged in the complaint and represented at the hearing that the General Counsel was alleging that an employee was discharged because *he* engaged in protected activities, but the administrative law judge did not find a violation based that theory and, instead, found that the employee was discharged in retaliation for suspected sabotage *by the Union*.¹⁰ Accordingly, the Board found that the administrative law judge's finding of a violation based on a theory never advanced by the General Counsel in the complaint or at the hearing, such that the underlying facts could not have been fully litigated at the hearing, deprived Respondent of due process.¹¹

Thus, *New York Post* is a case about a finding of an unfair labor practice of an administrative law

⁷ Although Respondent did not commit to these allegations in writing in its affirmative defense, in a voicemail message left for Counsel for the General Counsel, Respondent's Counsel suggested that its affirmative defense related to allegations of agents of the General Counsel "suborning perjury" and "fabricating allegations," though he did not provide any factual basis for those claims, and, in any event, the credibility of witnesses and the merits of the allegations of the Complaint, as amended, can be litigated at the hearing.

⁸ 353 NLRB 343 (2008).

⁹ *Id.* at 344.

¹⁰ *Id.*

¹¹ *Id.*

judge based on a theory not advanced or fully litigated at a hearing, not about conduct during the General Counsel's preliminary investigation, or even about the adequacy of a complaint to provide a respondent with notice of alleged violations. Since the Administrative Law Judge has not found any unfair labor practices yet, and, in fact, no hearing has yet been held, the Administrative Law Judge could not possibly have deprived Respondent of due process by making a finding based on a theory not advanced or fully litigated at a hearing.

In sum, there is no basis for Respondent's defense, and it should be summarily rejected. Counsel for the General Counsel respectfully requests that the Administrative Law Judge ensure that the hearing in this matter remains, as unfair labor practice hearings are intended to be, a hearing on the allegations of the Complaint, by striking Respondent's fourth affirmative defense and ordering that Respondent not present evidence in support of that defense at the hearing.

Signed at Phoenix, Arizona, this 31st day of August 2016.

Respectfully submitted,

/s/ Fernando Anzaldua

Fernando Anzaldua
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Telephone: (602) 416-4757
Email: fernando.anzaldua@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S MOTION TO STRIKE RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE in Stern Produce Company, Inc., Cases 28-CA-163215, 28-CA-166351 and 28-CA-168680, was served by E-Gov, and E-Filing, E-Mail, or Regular U.S. Mail on this 31st of August 2016, on the following:

Via E-Gov & E-Filing:

Honorable Gerald M. Etchingham
Associate Chief Administrative Law Judge
NLRB – Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Via E-Mail:

John Alan Doran, Attorney at Law
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254
jdoran@shermanhoward.com

Patrick R. Scully, Attorney at Law
Sherman & Howard, LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202
pscully@shermanhoward.com

David L. Barber
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 800
San Francisco, CA 94105-2821
dbarber@dcbsf.com

/s/ Stephanie Blackburn-Jorgensen

Stephanie E. Blackburn-Jorgensen
Administrative Assistant
National Labor Relations Board
Region 28 - Albuquerque Resident Office
421 Gold Avenue SW, Suite 310
Albuquerque, New Mexico 87102
Telephone: (505) 313-7216
Facsimile: (505) 206-5695
E-Mail: Stephanie.Blackburn-Jorgensen@nlrb.gov

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**Case 28-CA-163215
28-CA-166351
28-CA-168680**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**ANSWER TO AMENDED CONSOLIDATED COMPLAINT AND
NOTICE OF HEARING**

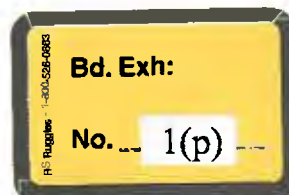
Stern Produce Company, Inc. ("Employer" or "Respondent"), by and through its attorneys Sherman & Howard L.L.C., pursuant to Sections 102.21 of the Rules and Regulations of the National Labor Relations Board ("Board"), hereby Answers and otherwise responds to the Amended Consolidated Complaint and Notice of Hearing ("Complaint") as follows:

1.

- (a) Respondent admits the allegations set forth in Paragraph 1(a) of the Complaint.
- (b) Respondent admits the allegations set forth in Paragraph 1(b) of the Complaint.
- (c) Respondent admits the allegations set forth in Paragraph 1(c) of the Complaint.
- (d) Respondent admits the allegations set forth in Paragraph 1(d) of the Complaint.

2.

- (a) Respondent admits the allegations set forth in Paragraph 2(a) of the Complaint.
- (b) Respondent admits the allegations set forth in Paragraph 2(b) of the Complaint.



(c) Respondent admits the allegations set forth in Paragraph 2(c) of the Complaint.

3.

Respondent admits Charging Party is a labor organization within the meaning of Section 2(5) of the Act, but denies Charging Party is a proper party to this action.

4.

(a) Respondent admits William Stern is Respondent's President and is a supervisor or agent within the meaning of Sections 2(11) or 2(13) of the Act. Respondent states that Jesus Tarango holds the position of driver supervisor and is a supervisor or agent within the meaning of Sections 2(11) or 2(13) of the Act. Respondent otherwise denies the allegations set forth in Paragraph 4(a) of the Complaint.

(b) Respondent admits that Mr. Pasalagua and Ms. Penn are agents of Respondent within the meaning of Section 2(13) of the Act. Respondent otherwise denies the allegations set forth in Paragraph 4(b) of the Complaint.

5.

(a) Respondent denies the allegations set forth in Paragraph 5(a) of the Complaint, including its subparts (i), (ii), and (iii).

(b) Respondent denies the allegations set forth in Paragraph 5(b) of the Complaint, including its subparts (i), (ii), and (iii).

(c) Respondent denies the allegations set forth in Paragraph 5(c) of the Complaint, including its subparts (i) and (ii).

(d) Respondent denies the allegations set forth in Paragraph 5(d) of the Complaint, including its subparts (i) and (ii).

(e) Respondent denies the allegations set forth in Paragraph 5(e) of the Complaint.

EXHIBIT NO. Sc(P) RECEIVED ☒ REJECTED ☐
CASE NO. 280A163215 CASE NAME: Stern Produce
NO. OF PAGES: 7 DATE: 9/6/16 REPORTER: DD

- (f) Respondent denies the allegations set forth in Paragraph 5(f) of the Complaint.
- (g) Respondent denies the allegations set forth in Paragraph 5(g) of the Complaint.
- (h) Respondent denies the allegations set forth in Paragraph 5(h) of the Complaint.
- (i) Respondent denies the allegations set forth in Paragraph 5(i) of the Complaint,
including its subparts (i) and (ii).
- (j) Respondent denies the allegations set forth in Paragraph 5(j) of the Complaint,
including its subparts (i) and (ii).
- (k) Respondent denies the allegations set forth in Paragraph 5(k) of the Complaint.
- (l) Respondent denies the allegations set forth in Paragraph 5(l) of the Complaint.
- (m) Respondent denies the allegations set forth in Paragraph 5(m) of the Complaint.
- (n) Respondent denies the allegations set forth in Paragraph 5(n) of the Complaint.
- (o) Respondent denies the allegations set forth in Paragraph 5(o) of the Complaint,
including its subparts (i) and (ii).
- (p) Respondent denies the allegations set forth in Paragraph 5(p) of the Complaint,
including its subparts (i) and (ii).
- (q) Respondent denies the allegations set forth in Paragraph 5(q) of the Complaint.
- (r) Respondent denies the allegations set forth in Paragraph 5(r) of the Complaint,
including its subparts (i), (ii), and (iii).
- (s) Respondent denies the allegations set forth in Paragraph 5(s) of the Complaint,
including its subparts (i), (ii), and (iii).
- (t) Respondent denies the allegations set forth in Paragraph 5(t) of the Complaint.
- (u) Respondent denies the allegations set forth in Paragraph 5(u) of the Complaint,
including its subparts (i), (ii), and (iii).

6.

- (a) Respondent denies the allegations set forth in Paragraph 6(a) of the Complaint.
- (b) Respondent denies the allegations set forth in Paragraph 6(b) of the Complaint.
- (c) Respondent admits Charging Party filed the petition on the date indicated which set forth a request for recognition, but otherwise denies the allegations set forth in Paragraph 6(c) of the Complaint.
- (d) Respondent denies the allegations set forth in Paragraph 6(d) of the Complaint.
- (e) Respondent denies the allegations set forth in Paragraph 6(e) of the Complaint, including its subparts (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), and (ix).
- (f) Respondent denies the allegations set forth in Paragraph 6(f) of the Complaint.
- (g) Respondent denies the allegations set forth in Paragraph 6(g) of the Complaint.

7.

Respondent denies the allegations set forth in Paragraph 7 of the Complaint.

8.

Respondent denies the allegations set forth in Paragraph 8 of the Complaint.

9.

Respondent denies the allegations set forth in Paragraph 9 of the Complaint.

10.

In response to the proposed remedies set forth in the Complaint, Respondent denies that General Counsel or Charging Party are entitled to any relief, much less the extraordinary remedies set forth in the Complaint. Respondent affirmatively states that the remedies requested are otherwise unwarranted and beyond the Board's authority.

11.

Respondent denies all allegations not specifically admitted herein.

FIRST SEPARATE DEFENSE

The Complaint is based on material misrepresentations of fact.

SECOND SEPARATE DEFENSE

Respondent's statements were privileged under Section 8(c) of the Act.

THIRD SEPARATE DEFENSE

The Complaint is barred by the Board's decision *Crown Bolt*, 343 NLRB 776 (2004).

FOURTH SEPARATE DEFENSE

Respondent was denied due process under NYP Holdings, Inc., 353 NLRB 343 (2008), in view of General Counsel's failure to provide a clear statement of the allegations and theory against Respondent, failure to provide Respondent a fair opportunity to respond to allegations asserted by Charging Party, and repeated alteration of its purported theory of liability.

FIFTH SEPARATE DEFENSE

The Complaint seeks remedies beyond the Board's statutory authority.

SIXTH SEPARATE DEFENSE

Respondent relies on all proper defenses lawfully available that may be disclosed by the evidence in the instant case and reserves the right to amend this pleading to state such other defenses and/or to otherwise supplement this pleading upon discovery of facts or evidence rendering such action appropriate.

Respectfully submitted this 29th day of August, 2016.

s/ John Alan Doran

John Alan Doran
SHERMAN & HOWARD L.L.C.
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

Patrick R. Scully
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, a true and correct copy of the foregoing **ANSWER TO AMENDED CONSOLIDATED COMPLAINT AND NOTICE OF HEARING** was E-filed with the NLRB E-Filing System and served via Federal Express, postage/delivery prepaid, to the following:

Cornele Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 N. Central Avenue, Suite 1400
Phoenix, AZ 85004

e-filed

Fernando Anzaldúa, Esq.
Sara Demirok, Esq.
Sandra Lyons, Esq.
Counsel for General Counsel
National Labor Relations Board
Region 28
2600 North Central Ave., Suite 1400
Phoenix, AZ 85004

e-filed

United Food and Commercial
Workers, Local 99
2401 N. Central Avenue, Floor 2
Phoenix, AZ 85004-1331

via FEDEX

David Barber, Esq.
Davis Cowell & Bowe
595 Market St #1400
San Francisco, CA 94105

via FEDEX

s/ Lori Ann Hinkel

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**Cases 28-CA-163215
28-CA-166351
28-CA-168680**

**GENERAL COUNSEL'S MOTION FOR A
BILL OF PARTICULARS**

Pursuant to Sections 102.20 and 102.24 of the Rules and Regulations of the National Labor Relations Board (the Board), Counsel for the General Counsel (CGC) moves for a Bill of Particulars addressed to the fifth and sixth affirmative defenses in the Answer to Consolidated Complaint and Notice of Hearing (Answer) filed on July 25, 2016, by Respondent Stern Produce Company, Inc. (Respondent). Section 10292.2 of the NLRB Unfair Labor Practice Casehandling Manual provides for the filing of a Motion for a Bill of Particulars "where an affirmatively pleaded defense lacks sufficient details." In its Answer, Respondent insufficiently pleads the following affirmative defenses:

FIFTH SEPARATE DEFENSE

The Complaint is barred by the doctrine of unclean hands.

SIXTH SEPARATE DEFENSE

Respondent was denied due process.

Based merely on Respondent's general, unsupported and conclusory assertions, CGC is unable to determine the factual basis for Respondent's affirmative defenses, which witnesses might have responsive information, or what other evidence might bear on Respondent's alleged defenses. Without more, CGC will be substantially prejudiced in

Bd. Exh:

No. 1(o)

presenting its case. Accordingly, CGC requests that Respondent be ordered to set forth with specificity a clear and concise description of the acts, conduct, facts, and evidence which are claimed to constitute the bases for its fifth and sixth affirmative defenses.

Ordering Respondent to provide additional details is proper. See NLRB Unfair Labor Practice Casehandling Manual § 10292.2; see also *Murcel Manufacturing Corp.*, 231 NLRB 623 (1977). In that case, the employer pleaded, as an affirmative defense to a refusal-to-bargain charge, that the union engaged in race and sex discrimination, and the employer further served a subpoena seeking supporting evidence. The General Counsel moved for a bill of particulars and then, when the employer responded with unsupported, general allegations, moved to strike the affirmative defense. *Id.* at 625. The Board stated that the employer was “in effect, contending that this Agency is under a fundamental disability in the processing of this case” and that therefore it was incumbent upon the employer to “disclose the particular facts on which the disability is based so that an intelligent evaluation of the contention could be made.” *Id.* at 625 fn. 10. See also *Flaum Appetizing Corp.*, 357 NLRB 2006 (2011) (ALJ granted Counsel for General Counsel’s Motion for a Bill of Particulars regarding Employer’s affirmative defense; the Board then partially granted General Counsel’s Motion to Strike the affirmative defense.)

Similarly, Respondent’s defenses claim that the Agency is under a fundamental disability in the processing of the case, inasmuch as the complaint is barred under the doctrine of unclean hands and Respondent was denied due process as alleged—albeit unsupported and conclusory. Accordingly, it is appropriate for Respondent to provide particulars supporting its defenses.

EXHIBIT NO. G-11(0) RECEIVED ☒ REJECTED ☐

CASE NO. 28CA163215 CASE NAME: Stern Product

NO. OF PAGES: 5 DATE: 9/6/16 REPORTER: DQ

CGC's Motion should be granted because Respondent's conclusory and unsupported fifth and sixth affirmative defenses lack sufficient details for CGC to prepare and respond, thus prejudicing CGC.

Signed at Phoenix, Arizona, this 25th day of August 2016.

Respectfully submitted,

/s/ Fernando Anzaldua

Fernando Anzaldua
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Telephone: (602) 416-4757
Email: fernando.anzaldua@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S MOTION FOR A BILL OF PARTICULARS** in STERN PRODUCE COMPANY, INC., Cases 28-CA-163215, et al., was served via E-Gov, E-Filing, and E-Mail, on this 25th day of August 2016, on the following:

Via E-Gov, E-Filing:

Honorable Gerald M. Etchingham
Associate Chief Administrative Law Judge
NLRB – Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1735

Via Electronic Mail:

John Alan Doran, Attorney at Law
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254
jdoran@shermanhoward.com

Patrick R. Scully, Attorney at Law
Sherman & Howard, LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202
pscully@shermanhoward.com

David Barber, Attorney at Law
Davis, Cowell & Bowe, LLP
595 Market St., Suite 800
San Francisco, CA 94105
dbarber@dcbsf.com

/s/ Dawn M. Moore

Dawn M. Moore
Acting Secretary to the Regional Attorney
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**Case 28-CA-163215
28-CA-166351
28-CA-168680**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**AMENDED ANSWER TO CONSOLIDATED COMPLAINT AND
NOTICE OF HEARING**

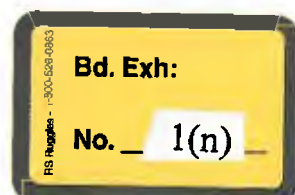
Stern Produce Company, Inc. ("Employer" or "Respondent"), by and through its attorneys Sherman & Howard L.L.C., pursuant to Sections 102.21 of the Rules and Regulations of the National Labor Relations Board ("Board"), hereby Answers and otherwise responds to the Consolidated Complaint and Notice of Hearing ("Complaint") as follows:

1.

- (a) Respondent admits the allegations set forth in Paragraph 1(a) of the Complaint.
- (b) Respondent admits the allegations set forth in Paragraph 1(b) of the Complaint.
- (c) Respondent admits the allegations set forth in Paragraph 1(c) of the Complaint.
- (d) Respondent admits the allegations set forth in Paragraph 1(d) of the Complaint.

2.

- (a) Respondent admits the allegations set forth in Paragraph 2(a) of the Complaint.
- (b) Respondent admits the allegations set forth in Paragraph 2(b) of the Complaint.



(c) Respondent admits the allegations set forth in Paragraph 2(c) of the Complaint.

3.

Respondent admits Charging Party is a labor organization within the meaning of Section 2(5) of the Act, but denies Charging Party is a proper party to this action.

4.

(a) Respondent admits William Stern is Respondent's President and is a supervisor or agent within the meaning of Sections 2(11) or 2(13) of the Act. Respondent states that Jesus Tarango holds the position of driver supervisor and is a supervisor or agent within the meaning of Sections 2(11) or 2(13) of the Act. Respondent otherwise denies the allegations set forth in Paragraph 4(a) of the Complaint.

(b) Respondent admits that Mr. Pasalagua and Ms. (Miko) Penn are agents of Respondent within the meaning of Section 2(13) of the Act. Respondent otherwise denies the allegations set forth in Paragraph 4(b) of the Complaint.

5.

(a) Respondent denies the allegations set forth in Paragraph 5(a) of the Complaint, including its subparts (i), (ii), and (iii).

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(c) Respondent denies the allegations set forth in Paragraph 5(c) of the Complaint, including its subparts (i) and (ii).

(d) Respondent denies the allegations set forth in Paragraph 5(d) of the Complaint, including its subparts (i) and (ii).

(e) Respondent denies the allegations set forth in Paragraph 5(e) of the Complaint.

EXHIBIT NO. 20 CA 163215 RECEIVED ☒ REJECTED ☐
CASE NO. 20 CA 163215 CASE NAME: Stern Products
NO. OF PAGES: 7 DATE: 9/6/16 REPORTER: PS

- (f) Respondent denies the allegations set forth in Paragraph 5(f) of the Complaint.
- (g) Respondent denies the allegations set forth in Paragraph 5(g) of the Complaint.
- (h) Respondent denies the allegations set forth in Paragraph 5(h) of the Complaint.
- (i) Respondent denies the allegations set forth in Paragraph 5(i) of the Complaint,
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including its subparts (i) and (ii).
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- (q) Respondent denies the allegations set forth in Paragraph 5(q) of the Complaint.
- (r) Respondent denies the allegations set forth in Paragraph 5(r) of the Complaint,
including its subparts (i), (ii), and (iii).
- (s) Respondent denies the allegations set forth in Paragraph 5(s) of the Complaint,
including its subparts (i), (ii), and (iii).
- (t) Respondent denies the allegations set forth in Paragraph 5(t) of the Complaint.

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- (a) Respondent denies the allegations set forth in Paragraph 6(a) of the Complaint.
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- (c) Respondent admits Charging Party filed the petition on the date indicated which set forth a request for recognition, but otherwise denies the allegations set forth in Paragraph 6(c) of the Complaint.
- (d) Respondent denies the allegations set forth in Paragraph 6(d) of the Complaint.
- (e) Respondent denies the allegations set forth in Paragraph 6(e) of the Complaint, including its subparts (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), and (ix).
- (f) Respondent denies the allegations set forth in Paragraph 6(f) of the Complaint.
- (g) Respondent denies the allegations set forth in Paragraph 6(g) of the Complaint.

7.

Respondent denies the allegations set forth in Paragraph 7 of the Complaint.

8.

Respondent denies the allegations set forth in Paragraph 8 of the Complaint.

9.

Respondent denies the allegations set forth in Paragraph 9 of the Complaint.

10.

In response to the proposed remedies set forth in the Complaint, Respondent denies that General Counsel or Charging Party are entitled to any relief, much less the extraordinary remedies set forth in the Complaint. Respondent affirmatively states that the remedies requested are otherwise unwarranted and beyond the Board's authority.

11.

Respondent denies all allegations not specifically admitted herein.

FIRST SEPARATE DEFENSE

The Complaint is based on material misrepresentations of fact.

SECOND SEPARATE DEFENSE

Respondent's statements were privileged under Section 8(c) of the Act.

THIRD SEPARATE DEFENSE

The Complaint is barred by the Board's decision *Crown Bolt*, 343 NLRB 776 (2004).

FOURTH SEPARATE DEFENSE

The Complaint is barred by the doctrine of unclean hands.

FIFTH SEPARATE DEFENSE

Respondent was denied due process.

SIXTH SEPARATE DEFENSE

The Complaint seeks remedies beyond the Board's statutory authority.

SEVENTH SEPARATE DEFENSE

Respondent relies on all proper defenses lawfully available that may be disclosed by the evidence in the instant case and reserves the right to amend this pleading to state such other defenses and/or to otherwise supplement this pleading upon discovery of facts or evidence rendering such action appropriate.

Respectfully submitted this 22nd day of August, 2016.

s/ John Alan Doran

John Alan Doran
SHERMAN & HOWARD L.L.C.
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

Patrick R. Scully
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, a true and correct copy of the foregoing **AMENDED ANSWER TO CONSOLIDATED COMPLAINT AND NOTICE OF HEARING** was E-filed with the NLRB E-Filing System and served via Federal Express, postage/delivery prepaid, to the following:

Cornele Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 N. Central Avenue, Suite 1400
Phoenix, AZ 85004

e-filed

Fernando Anzaldúa, Esq.
Counsel for General Counsel
National Labor Relations Board
Region 28
2600 North Central Ave., Suite 1400
Phoenix, AZ 85004

e-filed

United Food and Commercial
Workers, Local 99
2401 N. Central Avenue, Floor 2
Phoenix, AZ 85004-1331

via FEDEX

David Barber, Esq.
Davis Cowell & Bowe
595 Market St #1400
San Francisco, CA 94105

via FEDEX

s/ Mary Ann Meise

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

STERN PRODUCE COMPANY, INC.

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

Cases 28-CA-163215
28-CA-166351
28-CA-168680

AFFIDAVIT OF SERVICE OF: AMENDMENT TO CONSOLIDATED COMPLAINT
(with Forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 19, 2016**, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Stern Produce Company, Inc.
3200 South 7th Street
Phoenix, AZ 85040-1117
7014 2120 0004 7708 7374

John Alan Doran, Attorney at Law
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

United Food and Commercial
Workers, Local 99
2401 North Central Avenue, Floor 2
Phoenix, AZ 85004-1331

Patrick R. Scully, Attorney at Law
Sherman & Howard, LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202

August 19, 2016

Date

Nancy E. Martinez,
Designated Agent of NLRB

Name

/s/ Nancy E. Martienz

Signature

G. C. Exh:

No. 1(m)

EXHIBIT NO. GC1 (W) ✓
CASE NO. 20CA163215 CASE NAME: Steven Producers
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: ES

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**Cases 28-CA-163215
28-CA-166351
28-CA-168680**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

AMENDMENT TO CONSOLIDATED COMPLAINT

An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing
Complaint and Notice of Hearing (Complaint) having issued on July 19, 2016, **IT IS
HEREBY ORDERED**, pursuant to Section 102.17 of the Board's Rules and Regulations,
that the Complaint is amended in the following respects:

The position of Jesus Tarango in paragraph 4(a) is replaced with the following
new position, "Driver Supervisor";

The name of Mico Penn in paragraph 4(b) is replaced with the new name,
"Miko Penn";

The name of Mico Penn in paragraph 5(b) is replaced with the new name,
"Miko Penn";

The words "the Employer" in paragraph 5(c)(i) are replaced with
"Respondent";

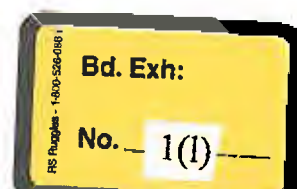


EXHIBIT NO G(1(i)) RECEIVED ☒ REJECTED ☐

28CA 163215
CASE NO. CASE NAME: Steno Produce

NO. OF PAGES: 5 DATE: 9/6/16 REPORTER: JL

New paragraph 5(u), and its subsections, is added to the Complaint as follows:

5. (u) About November 1, 2015, Respondent, by Pasalagua, at Respondent's facility:
- (i) by making a statement indicating he knew particular employees had engaged in Union activities, without disclosing the source of that information, created an impression among its employees that their union activities were under surveillance;
 - (ii) promised its employees promotions to discourage them from supporting the Union; and
 - (iii) threatened its employees with unspecified reprisals if they engaged in Union activities or protected, concerted activities.

RESPONDENT IS FURTHER NOTIFIED that it must file an answer to this Amendment to Consolidated Complaint. **The answer must be received by this office on or before September 2, 2016, or postmarked on or before September 1, 2016.** Unless filed electronically in a pdf format, Respondent should file the original copy of the answer with this office. Respondent should serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the

Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

Dated at Phoenix, Arizona, this 19th day of August 2016.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

Attachments

**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE**

Cases 28-CA-163215
28-CA-166351
28-CA-168680

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Stern Produce Company, Inc.
3200 South 7th Street
Phoenix, AZ 85040-1117

John Alan Doran, Attorney at Law
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

United Food and Commercial
Workers, Local 99
2401 North Central Avenue, Floor 2
Phoenix, AZ 85004-1331

Patrick R. Scully, Attorney at Law
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Denver, CO 80202

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**Case 28-CA-163215
28-CA-166351
27-CA-168680**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

ANSWER TO CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Stern Produce Company, Inc. ("Employer" or "Respondent"), by and through its attorneys Sherman & Howard L.L.C., pursuant to Sections 102.21 of the Rules and Regulations of the National Labor Relations Board ("Board"), hereby Answers and otherwise responds to the Consolidated Complaint and Notice of Hearing ("Complaint") as follows:

1.

- (a) Respondent admits the allegations set forth in Paragraph 1(a) of the Complaint.
- (b) Respondent admits the allegations set forth in Paragraph 1(b) of the Complaint.
- (c) Respondent admits allegations set forth in Paragraph 1(c) of the Complaint.
- (d) Respondent admits the allegations set forth in Paragraph 1(d) of the Complaint.

2.

- (a) Respondent admits the allegations set forth in Paragraph 2(a) of the Complaint.
- (b) Respondent admits the allegations set forth in Paragraph 2(b) of the Complaint.
- (c) Respondent admits the allegations set forth in Paragraph 2(c) of the Complaint.

Bd. Exh:

No. 1(k)

EXHIBIT NO. 201(K) RECEIVED ☒ REJECTED ☐

CASE NO. 20CA 163 Z 15 CASE NAME STERN Prodyce

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3.

Respondent admits Charging Party is a labor organization within the meaning of Section 2(5) of the Act, but denies Charging Party is a proper party to this action.

4.

(a) Respondent admits William Stern is Respondent's President and is a supervisor or agent within the meaning of Sections 2(11) or 2(13) of the Act. Respondent states that Jesus Tarango holds the position of driver supervisor and is a supervisor or agent within the meaning of Sections 2(11) or 2(13) of the Act. Respondent otherwise denies the allegations set forth in Paragraph 4(a) of the Complaint.

(b) Respondent admits that Mr. Pasalagua and Ms. (Miko) Penn are agents of Respondent within the meaning of Section 2(13) of the Act. Respondent otherwise denies the allegations set forth in Paragraph 4(b) of the Complaint.

5.

(a) Respondent denies the allegations set forth in Paragraph 5(a) of the Complaint, including its subparts (i), (ii), and (iii).

(b) Respondent denies the allegations set forth in Paragraph 5(b) of the Complaint, including its subparts (i), (ii), and (iii).

(c) Respondent denies the allegations set forth in Paragraph 5(c) of the Complaint, including its subparts (i) and (ii).

(d) Respondent denies the allegations set forth in Paragraph 5(d) of the Complaint, including its subparts (i) and (ii).

(e) Respondent denies the allegations set forth in Paragraph 5(e) of the Complaint.

(f) Respondent denies the allegations set forth in Paragraph 5(f) of the Complaint.

- (g) Respondent denies the allegations set forth in Paragraph 5(g) of the Complaint.
- (h) Respondent denies the allegations set forth in Paragraph 5(h) of the Complaint.
- (i) Respondent denies the allegations set forth in Paragraph 5(i) of the Complaint, including its subparts (i) and (ii).
- (j) Respondent denies the allegations set forth in Paragraph 5(j) of the Complaint, including its subparts (i) and (ii).
- (k) Respondent denies the allegations set forth in Paragraph 5(k) of the Complaint.
- (l) Respondent denies the allegations set forth in Paragraph 5(l) of the Complaint.
- (m) Respondent denies the allegations set forth in Paragraph 5(m) of the Complaint.
- (n) Respondent denies the allegations set forth in Paragraph 5(n) of the Complaint.
- (o) Respondent denies the allegations set forth in Paragraph 5(o) of the Complaint, including its subparts (i) and (ii).
- (p) Respondent denies the allegations set forth in Paragraph 5(p) of the Complaint, including its subparts (i) and (ii).
- (q) Respondent denies the allegations set forth in Paragraph 5(q) of the Complaint.
- (r) Respondent denies the allegations set forth in Paragraph 5(r) of the Complaint, including its subparts (i), (ii), and (iii).
- (s) Respondent denies the allegations set forth in Paragraph 5(s) of the Complaint, including its subparts (i), (ii), and (iii).
- (t) Respondent denies the allegations set forth in Paragraph 5(t) of the Complaint.

6.

- (a) Respondent denies the allegations set forth in Paragraph 6(a) of the Complaint.
- (b) Respondent denies the allegations set forth in Paragraph 6(b) of the Complaint.
- (c) Respondent admits Charging Party filed the petition on the date indicated which set forth a request for recognition, but otherwise denies the allegations set forth in Paragraph 6(c) of the Complaint.
- (d) Respondent denies the allegations set forth in Paragraph 6(d) of the Complaint.
- (e) Respondent denies the allegations set forth in Paragraph 6(e) of the Complaint, including its subparts (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), and (ix).
- (f) Respondent denies the allegations set forth in Paragraph 6(f) of the Complaint.
- (g) Respondent denies the allegations set forth in Paragraph 6(g) of the Complaint.

7.

Respondent denies the allegations set forth in Paragraph 7 of the Complaint.

8.

Respondent denies the allegations set forth in Paragraph 8 of the Complaint.

9.

Respondent denies the allegations set forth in Paragraph 9 of the Complaint.

10.

In response to the proposed remedies set forth in the Complaint, Respondent denies that General Counsel or Charging Party are entitled to any relief, much less the extraordinary remedies set forth in the Complaint. Respondent affirmatively states that the remedies requested are otherwise unwarranted and beyond the Board's authority.

11.

Respondent denies all allegations not specifically admitted herein.

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

The Complaint is based on material misrepresentations of fact.

THIRD SEPARATE DEFENSE

Respondent's statements were privileged under Section 8(c) of the Act.

FOURTH SEPARATE DEFENSE

The Complaint is barred by the Board's decision *Crown Bolt*, 343 NLRB 776 (2004).

FIFTH SEPARATE DEFENSE

The Complaint is barred by the doctrine of unclean hands.

SIXTH SEPARATE DEFENSE

Respondent was denied due process.

SEVENTH SEPARATE DEFENSE

The Complaint seeks remedies beyond the Board's statutory authority.

EIGHTH SEPARATE DEFENSE

Respondent relies on all proper defenses lawfully available that may be disclosed by the evidence in the instant case and reserves the right to amend this pleading to state such other defenses and/or to otherwise supplement this pleading upon discovery of facts or evidence rendering such action appropriate.

Respectfully submitted this 25th day of July, 2016.

s/ John Alan Doran

John Alan Doran
SHERMAN & HOWARD L.L.C.
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

Patrick R. Scully
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, Colorado 80202
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, a true and correct copy of the foregoing **ANSWER TO CONSOLIDATED COMPLAINT AND NOTICE OF HEARING** was E-filed with the NLRB E-Filing System and served via Federal Express, postage/delivery prepaid, to the following:

Cornele Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 N. Central Avenue, Ste. 1400
Phoenix, AZ 85004

e-filed

Judith E. Dávila, Esq.
Counsel for General Counsel
National Labor Relations Board
Region 28
2600 North Central Ave., Suite 1400
Phoenix, AZ 85004

e-filed

United Food and Commercial
Workers, Local 99
2401 N. Central Avenue, Floor 2
Phoenix, AZ 85004-1331

via FEDEX

s/ Mary Ann Meise

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**Cases 28-CA-163215
 28-CA-166351
 28-CA-168680**

**AFFIDAVIT OF SERVICE OF: ORDER CONSOLIDATING CASES,
CONSOLIDATED COMPLAINT AND NOTICE OF HEARING (with Forms NLRB-
4338 and NLRB-4668 attached)**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **July 19, 2016**, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Stern Produce Company, Inc.
3200 South 7th Street
Phoenix, AZ 85040-1117
Certified – 7015 3010 0002 2451 5754

John Alan Doran, Attorney at Law
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

United Food and Commercial
Workers, Local 99
2401 North Central Avenue, Floor 2
Phoenix, AZ 85004-1331

Patrick R. Scully, Attorney at Law
Sherman & Howard, LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202

July 19, 2016

Date

**Dawn M. Moore,
Designated Agent of NLRB**

Name

/s/ Dawn M. Moore

Signature



EXHIBIT NO. GC15 RECEIVED ☒ REJECTED ☐
28CA163215
CASE NO. _____ CASE NAME: Steno Produce
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: [Signature]

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

STERN PRODUCE COMPANY, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

**Cases 28-CA-163215
 28-CA-166351
 28-CA-168680**

**ORDER CONSOLIDATING CASES, CONSOLIDATED
COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 28-CA-163215, Case 28-CA-166351, and Case 28-CA-168680, which are based on charges filed by United Food and Commercial Workers Union, Local 99 (the Union) against Stern Produce, whose correct name is Stern Produce Company, Inc. (Respondent), are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

1. (a) The charge in Case 28-CA-163215 was filed by the Union on November 3, 2015, and a copy was served on Respondent by U.S. mail on the same date.

 (b) The charge in Case 28-CA-166351 was filed by the Union on December 18, 2015, and a copy was served on Respondent by U.S. mail on December 21, 2015.

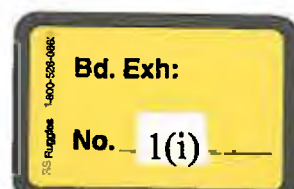


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28 CA 163215
CASE NO. _____ CASE NAME STERN Produce
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(c) The first amended charge in Case 28-CA-166351 was filed by the Union on January 29, 2016, and a copy was served on Respondent by U.S. mail on the same date.

(d) The charge in Case 28-CA-168680 was filed by the Union on January 29, 2016, and a copy was served on Respondent by U.S. mail on the same date.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Phoenix, Arizona (Respondent's facility), and has been engaged in the wholesale distribution of food products.

(b) During the 12-month period ending November 3, 2015, Respondent in conducting its operations described above in paragraph 2(a), purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Arizona.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. (a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Billy Stern	-	President
Kirk Massey	-	Vice President/General Manager
Jesus Tarango	-	Operations Manager

(b) At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of Section 2(13) of the Act:

Ricardo Pasalagua	-	Consultant
Mico Penn	-	Consultant

5. (a) On a date in or around October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Ricardo Pasalagua (Pasalagua), at Respondent's facility:

(i) interrogated its employees about their union membership, activities, and sympathies;

(ii) by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment to discourage them from supporting the Union; and

(iii) promised its employees increased workers' compensation benefits to discourage them from supporting the Union.

(b) On a date in or around late October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Mico Penn, at Respondent's facility:

(i) created an impression among its employees that their union activities were under surveillance by Respondent:

(A) by disclosing to employees that it knew employees had told other employees that they wanted to be stewards, without disclosing the source of that information; and

(B) by disclosing to employees that it knew a Union representative had been at Respondent's facility the night before, without disclosing the source of that information;

(ii) threatened its employees that a strike or lockout was inevitable if they selected the Union as their collective-bargaining representative and the Union did not concede to Respondent's bargaining demands; and

(iii) threatened its employees with a loss of benefits if they selected the Union as their collective-bargaining representative.

(c) On a date in or around late October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Pasalagua, at Respondent's facility:

(i) threatened its employees that the Employer would sell its business, causing its employees to lose their jobs if its employees selected the Union as their collective-bargaining representative; and

(ii) by telling employees that if the Union were able to negotiate a wage increase Respondent would make sure it was a nominal amount, informed its employees that it would be futile for them to select the Union as their collective-bargaining representative.

(d) On a date in or around late October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Pasalagua, at Respondent's facility:

(i) threatened its employees that the Employer would close its business if its employees selected the Union as their collective-bargaining representative; and

(ii) by telling employees that they should not pay attention to the Union because the Union would not be able to do anything because Respondent was the one with the last word, informed its employees that it would be futile for them to select the Union as their collective-bargaining representative.

(e) On a date in or around late October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Pasalagua, at Respondent's facility, promised its employees increased wages and other unspecified improved benefits if the Union lost a Board-conducted election.

(f) On a date in or around late October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent granted its employees benefits by implementing a previously unenforced open door policy in order to discourage employees from voting for Union representation.

(g) On a date in or around late October 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, by Pasalagua, at Respondent's facility, threatened its employees with a reduction of their hours of work if its employees selected the Union as their collective-bargaining representative.

(h) About October 31, 2015, Respondent, by a flyer distributed to its employees at Respondent's facility, by stating that Union organizers visited employees at home without an invitation without revealing the source of that information, created an

impression among its employees that their Union activities were under surveillance by Respondent.

(i) On a date in or around late October 2015 or early November 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, by Pasalagua, at Respondent's facility:

(i) interrogated its employees about their Union membership, activities, and sympathies; and

(ii) by telling its employees that the majority of employees did not support the Union, without disclosing the source of that information, created an impression among its employees that their Union activities were under surveillance.

(j) On a date in or around late October 2015 or early November 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, by Billy Stern (Stern), at Respondent's facility:

(i) interrogated its employees about their Union membership, activities, and sympathies; and

(ii) promised to provide its employees with jackets and other unspecified improved benefits if its employees did not select the Union as their collective-bargaining representative.

(k) On a date in or around early November 2015, Respondent, by Pasalagua, at Respondent's facility, threatened its employees with the withholding of benefits from them if they selected the Union as their collective-bargaining representative.

(l) On dates in or around early November 2015, Respondent, by Pasalagua, at Respondent's facility, threatened its employees that Respondent would engage

in dilatory bargaining tactics if its employees selected the Union as their collective-bargaining representative.

(m) About November 3, 2015, Respondent, by Stern, at Respondent's facility, promised its employees increased benefits and improved terms and conditions of employment to discourage them from supporting the Union.

(n) About November 12, 2015, Respondent implemented a program rewarding its employees with gift cards for 100 percent ratings on inspections and audits to discourage them from supporting the Union.

(o) On a date in or around late November 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Pasalagua, at Respondent's facility:

(i) threatened its employees that Respondent would close its business if they selected the Union as their collective-bargaining representative:

(A) by saying it was possible to close Respondent's business because of the Union; and

(B) by saying Respondent could close its door and not pay its employees if the Union ultimately loses and the employees participate in a strike; and

(ii) informed its employees that it would be futile for them to select the Union as their collective-bargaining representative:

(A) by telling employees that selecting the Union as their collective-bargaining representative would be in vain; and

(B) by telling employees that negotiations between the Union and Respondent would be useless.

(p) On a date in or around early December 2015, a more precise date unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent, by Jesus Tarango, at Respondent's facility:

(i) promulgated an overly broad and discriminatory rule or directive prohibiting its employees from talking about the Union; and

(ii) threatened its employees with unspecified consequences if they talked about the Union.

(q) On a date in or around early January 2016, Respondent, by Pasalagua, at Respondent's facility, by telling its employees that Respondent could not help them because it had to continue answering Board charges, discouraged employees from participating in a Board investigation.

(r) On a date in or around early January 2016, Respondent, by Pasalagua, at Respondent's facility:

(i) interrogated its employees about their participation in a Board investigation;

(ii) by suggesting that it knew employees were participating in a Board investigation without revealing the source of that information, created an impression among its employees that their participation in a Board investigation was under surveillance by Respondent; and

(iii) discouraged its employees from participating in a Board investigation.

(s) On a date in or around mid-January 2016, Respondent, by Pasalagua, at Respondent's facility:

(i) threatened its employees with unspecified reprisals for providing testimony to the Board;

(ii) interfered with a Board proceeding; and

(iii) interrogated its employees about their participation in a Board investigation.

(t) On a date in or around mid-January 2016, Respondent, by Pasalagua, at Respondent's facility, threatened its employees with unspecified reprisals to discourage them from participating in a Board investigation.

6. (a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time warehouse employees and drivers employed by Respondent at Respondent's facility, excluding all sales employees, accounting employees, office clerical employees, maintenance employees, managers, guards, and supervisors as defined by the Act.

(b) From about May 26, 2015, to about October 12, 2015, a majority of the Unit designated the Union as their exclusive collective-bargaining representative.

(c) About October 14, 2015, the Union, by filing the petition in Case 28-RC-161891, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit.

(d) The serious and substantial unfair labor practice conduct described above in paragraph 5 is such that there is only a slight possibility of traditional remedies erasing their effects and conducting a fair election. Therefore, on balance, the employees' sentiments regarding representation, having been expressed through authorization cards, would be protected better by issuance of a bargaining order.

(e) The allegations described above in paragraph 6(d) requesting the issuance of a bargaining order are supported by, among other things:

(i) Stern is a high ranking supervisor responsible for the conduct described above in paragraphs 5(j) and (m) and present for the conduct described above in paragraphs 5(e) through (g) and (i);

(ii) Pasalagua is a consultant whom Stern held out to employees as his surrogate and is responsible for the conduct described above in paragraphs 5(a), (c) through (e), (g), (i), (k), (l), (o), and (q) through (t);

(iii) the conduct described above in paragraphs 5(q) through (t) directly interfered with the Board's investigation of this matter;

(iv) the conduct described above in paragraph 5 has not been retracted;

(v) there are approximately 65 employees in the Unit described above in paragraph 6(a);

(vi) all of the Unit employees learned or were likely to learn of the conduct described above in paragraph 5;

(vii) the conduct described above in paragraph 5 followed immediately on the heels of the Respondent's knowledge of the Union's campaign;

(viii) the conduct described above in paragraph 5 directly impacted the Union's support among a majority of Unit employees;

(ix) there is a substantial likelihood of recidivism on Respondent's part, given that Pasalagua's conduct mirrors conduct by Pasalagua that was previously found by the Board to be unlawful, and that Respondent had Pasalagua speak to employees on its behalf both after the filing of the petition in Case 28-RC-161891 and after the filing of the unfair labor practice charges in this matter.

(f) At all times since about October 14, 2015, based upon Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(g) Since about October 14, 2015, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

7. By the conduct described above in paragraph 5, Respondent has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

8. By the conduct described above in paragraph 6, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

9. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for Respondent's unfair labor practices alleged above in paragraph 5 and 6, the General Counsel seeks an Order requiring Respondent to post notices to employees in English and Spanish.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that Respondent post a notice of explanation of rights in English and Spanish.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that, at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's representative Stern read the notice to employees in English and in Spanish on work time in the presence of a Board agent and a representative of the Union, and then have a Board agent read the notice of explanation of rights in English and Spanish in the presence of Respondent's supervisors and agents identified above in paragraph 5 and 6 and a representative of the Union. Alternatively, the General Counsel seeks an order requiring that, at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent promptly have a Board agent read the notice to employees and notice of explanation of rights in English and Spanish during work time in the presence of Respondent's supervisors and agents identified above in paragraph 5 and 6 and a representative of the Union.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that Respondent supply the Union, upon request, an alphabetized list of the full names and addresses of all employees currently employed by Respondent at Respondent's facility, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that Respondent, on request, grant the Union and its representatives reasonable access to post materials on Respondent's bulletin boards and in all places where notices to employees are customarily posted at Respondent's facility.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that Respondent, on request, grant the Union reasonable access to Respondent's facility, in nonwork areas during employees' nonwork time.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that Respondent give the Union notice of, and equal time and facilities for the Union to respond to, any address made by Respondent to employees employed by Respondent at Respondent's facility concerning the Union or collective bargaining.

As part of the remedy for the unfair labor practices alleged above in paragraph 5 and 6, the General Counsel also seeks an Order requiring that Respondent afford the Union the right to deliver a 30-minute speech to employees on working time.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before August 2, 2016, or postmarked on or**

before August 1, 2016. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on September 6, 2016, at 1:00 p.m. (local time), at the Hearing Room, National Labor Relations Board, 2600 North Central Avenue, Suite 1400, Phoenix, Arizona, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Phoenix, Arizona, this 19th day of July, 2016.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 28-CA-163215
28-CA-166351
28-CA-168680

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Stern Produce Company, Inc.
3200 South 7th Street
Phoenix, AZ 85040-1117

John Alan Doran, Attorney at Law
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

United Food and Commercial
Workers, Local 99
2401 North Central Avenue, Floor 2
Phoenix, AZ 85004-1331

Patrick R. Scully, Attorney at Law
Sherman & Howard, LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERN PRODUCE COMPANY INC.

Charged Party

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

Charging Party

Case 28-CA-166351

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 29, 2016, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Kirk Massey, Vice President/General
Manager
Stern Produce Company Inc.
3200 South 7th Street
Phoenix, AZ 85040-1117

John Alan Doran, Attorney at Law
Sherman and Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254

Patrick R. Scully, Esq.
Sherman & Howard, LLC.
633 17th Street, Suite 3000
Denver, CO 80202-3622

1/29/16

Date

Kay Davis, Designated Agent of NLRB

Name

/s/ Kay Davis

Signature

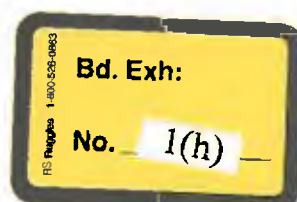


EXHIBIT NO. GC16h RECEIVED ☒ REJECTED ☐
CASE NO. Z8A168215 Stem Produce
NO. OF PAGES: 2 9/6/16 DR

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
FIRST AMENDED
CHARGE AGAINST EMPLOYER**

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
28-CA-166351	JANUARY 29, 2016

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Stern Produce Company, Inc.		b. Tel. No. 602-268-6628
		c. Cell No.
d. Address (street, city, state ZIP code) 3200 South 7th Street Phoenix, AZ 85040	e. Employer Representative Kirk Massey	f. Fax No.
		g. e-Mail
		h. Dispute Location (City and State) Phoenix, AZ
i. Type of Establishment (factory, nursing home, hotel) Produce warehouse	j. Principal Product or Service food distribution and wholesaler	k. Number of workers at dispute location ~60

1. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

See attached.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

United Food and Commercial Workers Union, Local 99

4a. Address (street and number, city, state, and ZIP code) 2401 North Central Avenue Phoenix, AZ 85004	4b. Tel. No. 602-254-0099
	4c. Cell No.
	4d. Fax No. 602-251-0459
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

United Food and Commercial Workers International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No.
602-251-0454

Office, if any, Cell No.

By: 1225
(signature of representative or person making charge)

Ricardo Gomez, Organizer

Print Name and Title

Fax No.
602-251-0459

e-Mail

Address: 2401 North Central Avenue Phoenix, AZ 85004

Date: 1/29/16

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Bd. Exh:

No. 1(g)

EXHIBIT NO. 8C(6) RECEIVED ☒ REJECTED ☐
CASE NO. 28CA163215 CASE NAME: STERIS Produce
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: BS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERN PRODUCE COMPANY, INC.

Charged Party

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

Charging Party

Case 28-CA-168680

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on January 29, 2016, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Stern Produce Company, Inc.
3200 South 7th Street
Phoenix, AZ 85040-1117

January 29, 2016

Date

Kay Davis, Designated Agent of NLRB

Name

/s/ Kay Davis

Signature

Bd. Exh:

No. 1(f)

EXHIBIT NO. (2) (f) RECEIVED ☒ REJECTED ☐
Z8CA 163215
CASE NO. _____ CASE NAME: Stem Produce
NO. OF PAGES: 2 9/6/16 REPORTER: DP

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
28-CA-168680	January 29, 2016

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer Stern Produce Company, Inc.		b. Tel. No. 602-268-6628
		c. Cell No.
d. Address (street, city, state ZIP code) 3200 South 7th Street Phoenix, AZ 85040	e. Employer Representative Kirk Massey	f. Fax No.
		g. e-Mail
		h. Dispute Location (City and State) Phoenix, AZ
i. Type of Establishment (factory, nursing home, hotel) Produce warehouse	j. Principal Product or Service food distribution and wholesaler	k. Number of workers at dispute location ~60
l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) See attached.		
3. Full name of party filing charge (if labor organization, give full name, including local name and number) United Food and Commercial Workers Union, Local 99		
4a. Address (street and number, city, state, and ZIP code) 2401 North Central Avenue Phoenix, AZ 85004		4b. Tel. No. 602-254-0099
		4c. Cell No.
		4d. Fax No. 602-251-0459
		4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) United Food and Commercial Workers International Union		
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. 602-251-0454
By:  (signature of representative or person making charge)		Office, if any, Cell No.
Print Name and Title Ricardo Gomez Martin Hernandez, Director of Organizing Organizer		Fax No. 602-251-0459
Address: 2401 North Central Avenue Phoenix, AZ 85004 Date: 1/29/16		e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

G. C. Exh:

No. 1(e)

Attachment

Within the last six months, the above-named employer has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act, through its actions, including but not limited to: interrogating employees about their union sympathies, promising employees benefits to discourage them from supporting United Food and Commercial Workers, Local 99 (the Union), threatening to withhold improved benefits from employees if they selected the Union as their collective bargaining representative, threatening to purposefully delay the collective bargaining process if the Union was elected as its employees' collective bargaining representative, and discouraging employees from filing unfair labor practice charges and participating in National Labor Relations Board investigations.

Within the last six months, the above-named employer has refused to recognize and bargain with the Union as the collective-bargaining representative of its employees, even though, due to the employer's serious and substantial nature of its unfair labor practices, there is only a slight possibility of traditional remedies erasing the effects of those unfair labor practices so that a fair election can be conducted, such that, on balance, the employees' sentiments regarding representation, having been expressed through authorization cards, would be protected better by issuance of a bargaining order.

EXHIBIT ID: GC1(e) RECEIVED ☒ REJECTED ☐
18CA163215
CASE NO. _____ CASE NAME: Steno Produce
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: DX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERN PRODUCE

Charged Party

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

Charging Party

Case 28-CA-166351

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on December 21, 2015, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Stern Produce
3200 South 7th Street
Phoenix, AZ 85040-1117

December 21, 2015

Date

Kay Davis, Designated Agent of NLRB

Name

/s/ Kay Davis

Signature

Bd. Exh:

No. 1(d)

EXHIBIT NO. GC1(1) RECEIVED ☒ REJECTED ☐
28CA168215
CASE NO. _____ CASE NAME: STEVEN PRODUCE
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: LSR

INTERNET
FORM NLRB-601
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case
28-CA-166351Date Filed
December 18, 2015

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Stem Produce		b. Tel. No. 602-266-6628
		c. Cell No.
d. Address (Street, city, state, and ZIP code) 3200 South 7th Street Phoenix, AZ 85040		f. Fax No.
		g. e-Mail
e. Employer Representative Kirk Massey		h. Number of workers employed ~60
i. Type of Establishment (factory, mine, wholesaler, etc.) Produce warehouse	j. Identify principal product or service food distribution and wholesaler	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months, the above named Employer has discriminated against employees by, among other ways, retaliating against union supporters by removing them from their driver routes.

By the above and other act, the above named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed under Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

United Food and Commercial Workers Union, Local 99

4a. Address (Street and number, city, state, and ZIP code)

2401 North Central Avenue
Phoenix, AZ 85004

4b. Tel. No. 602-254-0099

4c. Cell No.

4d. Fax No. 602-251-0459

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

United Food and Commercial Worker International Union

8. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By


Martin Hernandez, Director of Organizing
(Printtype name and title or office, if any)

Tel. No. 602-251-0454

Office, if any, Cell No.

Fax No. 602-251-0459

e-Mail

Address 2401 North Central Avenue Phoenix, AZ 85004

12-18-15
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is by the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are: (1) to provide information to the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Bd. Exh:

No. 1(c)

EXHIBIT NO. 621 (C) RECEIVED ☒ REJECTED ☐
CASE NO. 28A 163215 CASE NAME: Stem Produce
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: DL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERN PRODUCE

Charged Party

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

Charging Party

Case 28-CA-163215

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on November 3, 2015, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Stern Produce
3200 South 7th Street
Phoenix, AZ 85040-1117

November 3, 2015

Date

Nancy E. Martinez,
Designated Agent of NLRB

Name

/s/ Nancy E. Martinez

Signature

G C. Exh:

No. 1(b)

EXHIBIT NO. 661(b) RECEIVED ☒ REJECTED ☐
CASE NO. 28 CA 163215 CASE NAME: Stewart Prody et al
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: DJ

DO NOT WRITE IN THIS SPACE

Date Filed
11/03/2015

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

No. 1(a)

LS: 3:11 PM 8/1/16
EXHIBIT NO. 961 (a) RECEIVED ☒ REJECTED ☐
CASE NO. 28CA163Z15 CASE NAME: Stems Produce
NO. OF PAGES: 2 DATE: 9/6/16 REPORTER: LSX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

STERN PRODUCE COMPANY, INC.,

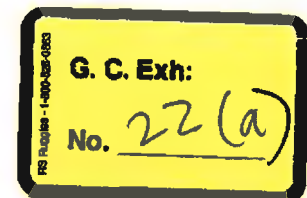
and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99.

Case No. 28-CA-163215
28-CA-166351
28-CA-168680

OCTOBER 29, 2015

MEETING HELD BY MIKO PENN
WITH STERN PRODUCE COMPANY, INC. EMPLOYEES



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1 MS. PENN: -- would include, too.

2 UNIDENTIFIED SPEAKER: You know something. When you've
3 got (indiscernible) I didn't (indiscernible).

4 MS. PENN: I get it.

5 UNIDENTIFIED SPEAKER: That's not a bribe.

6 MS. PENN: No, no, no. I'm not saying that I believe it's
7 a bribe. I'm saying that the government when they rule on
8 these cases considers it a bribe.

9 UNIDENTIFIED SPEAKER: I'm not saying anymore then. When
10 they ignore they -- they vote -- they (indiscernible).

11 HEARING OFFICER LAST NAME: Yes, but write Congress,
12 right. If you're having a problem with that rule, write your
13 state senators, your state congressmen and say what's the deal
14 with this food restriction, right. That's how to get around
15 it. Because I don't decide. Stern doesn't decide. The Union
16 doesn't decide. Write your congressman.

17 So I think we should go ahead and get started. And then
18 if people filter in, I can touch base with them later and fill
19 them in on what we talked about. Is that okay?

20 You want to come and sit down? There are chair -- plenty
21 of chairs stacked up in the back. Everything.

22 UNIDENTIFIED SPEAKER: I have to leave in a couple
23 minutes.

24 HEARING OFFICER LAST NAME: Oh, you have to go on the
25 road? Okay. And then -- if you can shut the door, that would

EXHIBIT NO. GC226 RECEIVED ☒ REJECTED ☐

CASE NO. 28CA16325 CASE NAME: STERN Produce

NO. OF PAGES 39 DATE 9/8/17 REPORTER: DL

1 be great. Yeah. Remember, we don't have management in the
2 meeting so that, you know, you feel comfortable bringing things
3 up that you normally wouldn't feel comfortable doing if
4 managers are here. If you're afraid that they'll, you know, be
5 offended by what you say, you know, as you know, I don't work
6 for Stern. So anything you say about Stern, it doesn't really
7 affect me personally. That just gives me the information I
8 need to make recommendations to Billy.

9 So today we're going over job strikes and job security.
10 The last, you know, big meeting. The only other one we're
11 going to have are quick, you know, one on ones with
12 (indiscernible). Some of you have asked to speak with Billy
13 personally. Those types of things. And also, on Monday of
14 next week, we'll be going over election procedures.

15 So you know, we keep reminding you when the election is.
16 And many of you have gone to, you know, David at night or Jesus
17 or Karrie and said, you know, what time are they again?
18 Because you're trying to work with your schedule. So you know,
19 Thursday, November 5th, a week from today, it's going to be 12
20 a.m. to 1 a.m., 4 a.m. to 6:30 a.m. and 6 p.m. to 7:30 p.m.

21 And I told some of you individually just one on one that
22 if your route doesn't allow you to be here during one of these
23 three times, and I think there are maybe two or three employees
24 so far that it affects, you have to let us know. So that we
25 can work on your schedule so that you can be here during these

1 times. Billy wants to make sure that every single person has a
2 chance to vote. Has the opportunity to vote because this is an
3 important decision.

4 So for whatever reason, you already foresee a problem, let
5 them know now so that they can start planning and, you know,
6 get that done. Because you can't let them know, you know, on
7 Wednesday, you know at 11 p.m. That's going to be too late to
8 change the routes for the next day. So just keep that in mind.

9 Now, the government sent us a sample of what the ballot is
10 going to look like and I just wanted you to know when we get,
11 you know, without this, you know, huge sample (indiscernible)
12 in the middle, we'll give you a clean copy. But this is what
13 we have right now to show you.

14 So you know the question that you're asked on these
15 ballots is really easy. Do you wish to be represented for
16 purposes of collective bargaining by United Food and Commercial
17 Workers Union Local 99? And if you want them to represent you,
18 you check the box yes or you know, it's also in Spanish. And
19 then also, you know, if you don't want the Union to represent
20 you, you check no. It's a very simple ballot. You're the only
21 one that touches it.

22 The government agent will hand you a ballot. You go to a
23 booth or a table, whatever they set up in the room, and then I
24 recommend just so you know, if you're concerned about anyone
25 else knowing how you voted, you know, fold it up twice and then

1 you put it in the box. You're the only one that touches it.

2 So we'll be going over some more about this next week
3 before the election when the government sends us their whole
4 packet. They just emailed this to us the other day.

5 So just to be clear, I said this in every meeting, I'm not
6 predicting the future. I'm just going over possibilities. I
7 don't know what will happen because I'm not Billy. And I'm not
8 the Union attorney. That's not me. We're going over
9 possibilities and what the law allows for.

10 So what does your election decide? Remember I said,
11 you're only voting on whether you want the Union to be your
12 representative. You know, if you were to say no, I don't want
13 the Union to be my representative, that doesn't mean you're
14 saying, you know, a yes for the company. It's just no, I don't
15 want to be represented by this particular local, this
16 particular Union.

17 Some of you have said you've been Union members before.
18 You've been members of the Teamsters for instance. Or a
19 different union in other industry. A couple of you have been
20 electrical workers, you know, in the past. Some of you have
21 been in construction, were part of other unions. They're not
22 on the ballot either. And neither is your company.

23 So it's about electing a third party representative and a
24 specific third party, Local 99, UFCW. It's about whether you
25 want your wages, hours and other terms and conditions of

1 employment like overtime, like health benefits, dental,
2 insurance, you know, scheduling to be negotiated by Local 99.

3 Now, it's not whether you want more money or benefits.
4 It's not whether you want better treatment. Or if you want
5 more or less overtime or if you want less work to do. Or it's
6 to give you a voice, right. Because the Union would be your
7 voice in that situation. They would be your exclusive
8 bargaining representative. At the negotiating table, it's the
9 Union's attorneys with Billy's attorney. You know, this isn't,
10 you know, you all get together and start negotiating a contract
11 for yourself. You're saying we don't want to do that because
12 that's what you have the right to do now. You're saying we
13 want Local 99 to do it.

14 So you know, these are typically the things you want, you
15 know, generally. But you know, you're saying that okay, you
16 want that to be negotiated and like we went over last time,
17 that doesn't guarantee that any of the things you want will
18 actually happen because the Union has no control over them.
19 Billy has final say. Remember, Billy has the power to give the
20 last, best and final offer. The take it or leave it. Right?

21 So like I said, the government is not going to force Billy
22 to agree. That's what we went over last time.

23 Now, if elected as your exclusive representative or
24 spokesperson, the Union has a duty to represent you. It's
25 called the duty of fair representation. But will you be

1 satisfied? Will you be happy with what they negotiate for you?
2 With what they bargain for you?

3 Now, this is a process of the duty of fair representation.
4 Your first step, you would go to your shop steward. Some of
5 you in here already have been saying that you would like to be
6 shop steward. And you've told your coworkers about that. And
7 you may be the person designated in that role and you would be
8 hearing a lot of the issues that come up from your coworkers if
9 you were representative.

10 Or you would call the Union office and talk to a
11 representative there and say look, you know, here's my issue.
12 And then you speak to them personally. Those are your two
13 options. The Union, not you, controls your grievance. Your
14 issue can get dropped, not when you decide, but when the Union
15 decides. And I'm going to show you that.

16 Now here's the grievance for Union stewards and business
17 representatives. And it says a Union's decision not to process
18 a grievance -- to arbitration. Arbitration for those of you
19 that don't know, is a process where, you know, for instance
20 when we go to the doctor, we sign all that paperwork, we fill
21 out our history and there's all these paperwork, we sign it,
22 they give it to the doctor. That's a duty to arbitrate.
23 Meaning we agree that we're not going to sue the Union. We're
24 going to go to arbitration first to see if we can resolve that
25 issue before court. That's what arbitration is.

1 So you know, they can decide not to process your grievance
2 or let you arbitrate that claim, go to, you know, sit down
3 meeting with anyone. Even if they're wrong, and it will not be
4 a breach of duty of fair representation as long as sufficient
5 investigation has been performed. Now if you Google this,
6 sufficient investigation is reading what your complaint is.
7 Right, saying you know, Union I want you to process my
8 grievance because I was fired. I want you to pursue that with
9 the Employer because I was wrongfully terminated. I was fired
10 for no reason, whatever the deal is.

11 And they sit there, they read it, and they decide no.
12 You've been fairly represented. They took it into
13 consideration, but they hold the power. That's fair
14 representation as long as they know what the issue is and made
15 a determination. They don't even have to tell you what that
16 determination is. And I'll show you.

17 The Union is not required to be right in its decision. So
18 even if they're wrong, there's no basis in the law and you get
19 upset. So this is what I was dealing with, you know, before I,
20 you know, I met with employees, right. I'm in a law office
21 handling issues where employees are coming to me saying, you
22 know, my Union didn't represent me fairly. They were unfair.
23 They just didn't move forward with my claim and I feel that I
24 was wronged. I feel like my Employer did something wrong in
25 the process.

1 And then I have to tell them it doesn't really matter
2 because you agreed to it. You chose, your contract with the
3 Union is that you are giving up your rights to speak for
4 yourself and let them make the decisions for you. Completely
5 legal. They could be wrong.

6 So here are a few examples. These are charges filed
7 against the Union, UFC Local 99, and these are what's called a
8 ULP, unfair labor practices. And you file it with the
9 government. These are from members. These aren't you right
10 now who aren't technically represented. These are current
11 members they have that are so unhappy with the Union that they
12 are suing them. And these are some of the reasons why.

13 I wanted to show you what the forms look like, you know,
14 it's called a CB charge, you know, because you are the
15 collective bargaining unit, CB. You know, the dates here is
16 with the United States government, the National Labor Relations
17 Board and like I said, UFC Local 99. So what was this one
18 about? Some of you have come to me and said, you know, I don't
19 want this Union thing. And I'm not going to pay dues because
20 we live in a right to work state.

21 So I am going to write a letter to the Union and say you
22 can't -- I'm not going to pay you. I don't want you to
23 represent me. Now, what happens when you do that? Well, the
24 person signed, you know, sorry, the Union wants a dues checkoff
25 clause. Remember, I told you that last time. There's certain

1 things the Union can't leave the table without. They need the
2 checkoff clause because they collect dues from you. And that's
3 their business. Without dues, they don't function. The Union
4 is not working for free. Just as you don't work for free, I
5 don't work for free, the Union is not here; it's not the
6 charity of United Food and Commercial Workers. They're a
7 business.

8 So they sign the dues checkoff clause in the contract and
9 required a 15-day window once per year to opt out. Meaning
10 only 15 days out of 365 days were you able to notify the Union
11 that you didn't want to pay dues. You said no dues. I'm not
12 paying you. Well, they kept deducting them anyway. Even
13 though this employee filed a checkoff revocation, that's the
14 letter I'm talking about, they -- the Union claimed it didn't
15 file it within the proper 15-day window. So now for that whole
16 year, you're paying dues anyway. Even though they told you you
17 wouldn't have to.

18 Here are other charges. So this one was at Fry's Food
19 Stores, December 8th, 2014. It says that on September 24th,
20 the labor organization, Local 99, has restrained and coerced
21 employees by refusing to process the grievance of Carol Courier
22 regarding violating the seniority provisions in the collective
23 bargaining agreement. So remember, the Union contract always
24 has seniority in it. Meaning the person that worked here the
25 longest is number 1 on a list. And so the reason why they

1 order you that way, 1 through 65 in this case, would be in
2 terms of, you know, if the number 1 guy wants to go home,
3 doesn't want to work overtime for instance, they'll go to the
4 number 1 guy and say do you want the overtime. If number 1
5 says no, they go to number 2. Do you want it? And then if
6 they get too far down the list, then they're going to go to the
7 65th guy, the guy that's been here for two weeks and say, you
8 have to do it, number 65. Right? That's the way they offer
9 from the top down and they force from the bottom up. That's
10 just how seniority works.

11 UNIDENTIFIED SPEAKER: Not good.

12 MS. PENN: So some people like that, right? But they
13 don't follow their rules. That's what this charge is about.
14 This employee is saying that the Union did not -- they violated
15 her seniority provision of the contract. Because when she
16 became a member, that's what they promised her. And they
17 didn't, they didn't give her those rights.

18 Here's another charge. During the last six months, the
19 Union has violated duty to bargain in good faith by refusing to
20 meet for bargaining, delaying bargaining, propounding
21 overbroad, unnecessary and misdirected requests for
22 information. So what they're doing is stalling the process.
23 They are telling you right now we are going to go to the table,
24 we're going opt negotiate a better contract for you as soon as
25 possible. Not necessarily the case, right? Delaying for six

1 months, that's a long time to not meet with anyone to discuss
2 any terms.

3 So when they say okay, it's going to happen right away,
4 right away, their own Union is not meeting right away. They're
5 saying, you know what, our first meeting will be six months
6 from now. Within the last six months again, the labor
7 organization UFCW has breached its duty to fair representation
8 of Lori Roner, whoever this is. By refusing to process her
9 grievance for her termination. So Lori Roner was fired and she
10 said, look, you know, I was wrongfully terminated. They should
11 not have fired me. And they chose not to process her
12 grievance. Because they can, right? They look at the paper,
13 okay, Lori Roner, you know, was wrong -- she feels that she was
14 wrongfully terminated. We don't. And I'll show you why later
15 that they can't even really process this grievance.

16 Another charge, right? Sandra Bryant. They refused to
17 process her grievance over her pay rate being reduced.
18 Remember, this is all a negotiation. Billy is going to
19 negotiate his rights in the contract or else he won't sign it.
20 And I'll show you what a management right clause looks like.
21 Billy's going to make sure that he can hire, fire, you know,
22 cut wages, cut benefits at any time he wants and the Union is
23 going to agree. And the contract they've showed some of you of
24 JBS had those same provisions. I'll show you.

25 Here's another one. They are not representing fairly

1 their Spanish speaking employees. Their Spanish speaking
2 members. They, you know, many of you here prefer speaking in
3 Spanish. That's your first language, you're more comfortable
4 in it. Well, are they going to represent you? Because
5 remember, these government grievances are all in English.
6 That's just how our government works, right?

7 So they said you're not representing the Spanish speaking
8 unit and here's what they did. Instead of paying their Spanish
9 speaking members their own benefit, they said go get your
10 benefits in Mexico. You, the Mexico PPO network, rather than
11 our Blue Cross Blue Shield. I'm not making this up, right?
12 This is filed with the government. These are the charges.
13 That's why I'm showing them to you. And many of you in this
14 room may be affected by that. I don't know. Maybe you won't.
15 And that's okay that this charge won't apply to you.

16 Here's another thing. They were accepting Union dues even
17 though employees said they did not want to pay. It is my right
18 in Arizona to not pay dues, but they did it anyway. Here's
19 another one. They refused to accept her dues checkoff
20 revocation. Again, this is just one employee after another. I
21 just chose a couple. But if you want to look, there are, you
22 know, 18 of each charge, right? It's a whole 80 plus page
23 document.

24 Now, they filed numerous grievances against Safeway at
25 some point. Also, Local 99. The Union rep Wes Young, I don't

1 know if he still works for Local 99, refuses to submit. He
2 just doesn't even submit it for review. Because he'll note it.
3 We're not moving forward with this.

4 And if you can imagine you as the employee that has a
5 problem, wouldn't you want them to take your issues seriously?
6 Resolve your problem? Why do you need third party
7 representation if they're not going to fight for you? You
8 know, so here we go. More benefits being cut.

9 This one's interesting because we've told you what could
10 happen during a strike. And UFCW is a very aggressive Union.
11 There are some that aren't. They are not one of them. They
12 are very aggressive. And what they did was they have incited,
13 meaning they've asked their members to engage in violent
14 activities while they're on strike. Those who cross the picket
15 lines that decide I want to go to work, I'm not going out on
16 strike, are being harassed, intimidated, they're being
17 threatened. They're being approached, you know, the Union's
18 encouraging them to go, you know, grab whatever they have and
19 go beat that person up. This is one charge out of many. And
20 you have to think. Being on strike is your negotiating power
21 if something comes to a standstill. You withhold your labor,
22 you go on strike, so that Billy suffers. Because your
23 customers suffer if you're not working.

24 And if you want the Union standing out there with a
25 digital camcorder or videotape and approaching employees and

1 threatening them, I don't know. That's not an organization I
2 would want to belong to. I don't want anyone that has to
3 resort to physical violence to get their word across. Right?
4 If you can rely on your brain and intellect to get you what you
5 want, you don't have to rely on your face. I told many of you
6 that before.

7 So here are the current elections that happened. We
8 showed you last time, this is from August 2014 to just a couple
9 months ago. This is called the Hall of Shame because these
10 decertification elections -- right now, you are involved in
11 potentially voting the Union in, right? You will be voting on
12 whether you want the Union to be your representative. A
13 decertification is when members are unhappy and they try to
14 kick them out. They don't want the Union anymore.

15 Well, UFCW members want to kick out the Union 50 percent
16 of the time. Fifty percent of the time, you vote for Local 99,
17 you want to kick them out because they didn't do their job.
18 Except kicking them out takes a long time.

19 So doesn't the Union limit Billy's control? They'll go
20 into negotiations and say, Billy, you know, we're going to make
21 sure that employees aren't terminated or they don't -- you
22 don't cut hours, you don't reduce pay for your employees.
23 Can't they tell Billy to do that? I've heard representatives
24 tell some of you that. They cannot.

25 Here's an agreement that, you know, they recently signed,

1 2012 term to 2016. That's if you want a hard copy to look
2 through it, I have it right here. Here's management rights.
3 So the Union's going to come to Billy and say we want dues and
4 we want you to collect them. Billy knows that and he's going
5 to say okay, if I give that to you, what are you going to give
6 to me? And usually you get an ironclad, a very strong
7 management rights clause. And this is all Billy has the right
8 to do. He has a right to the management of the plant including
9 the right to hire, suspend, discipline, discharge, assign jobs,
10 promote, demote, increase/decrease working force, so on and so
11 forth. And this goes on for three pages.

12 Billy will make sure he has a right to control the
13 business. The Union won't be able to say -- and that's why
14 they can't process your grievance some of the time. They told
15 you we're going to fight for you. When you're -- when you're
16 fired, we're going to go make sure you get your job back. Or
17 you get paid for the time you missed out on. No, Billy's going
18 to come back and say look at the agreement we signed. I have a
19 right to hire, fire, discipline, anything. So we'll be very
20 successful. That's why the Union will look at it and say duty
21 of fair representation, okay, we're done. That goes in our
22 file cabinet. We can't do anything about it.

23 Remember, the Union does not have control over Billy. It
24 is still Billy's company. So if our, you know, if Billy
25 negotiates hard, he does not compromise in negotiations, he's

1 not giving things away for free, what's your leverage? What if
2 you can't reach an agreement (indiscernible) because remember
3 if they're not agreeing, the parties just walk away. What
4 happened? We went over this last time, right? During
5 negotiations, they meet and if they hit an impasse, Billy will
6 give what's known as the last, best and final offer. He's not
7 going to meet with the Union for years and years and five
8 years, ten years, now ever long it takes. He's going to say
9 take it or leave it. This is it.

10 And we went over what happens if you accept it, you know,
11 that they may come to you and say we want you to accept these
12 terms. Even though it's not a great contract. And if you
13 reject the offer, but do not approve a strike, remember the
14 Union can sign that anyway. Because they're saying you're not
15 giving me the juice, the muscle to go back to Billy and demand
16 something.

17 So they can sign it. You can work without a contract.
18 Meaning that if the Union takes too long in responding, Billy
19 can say okay, these are the new terms I'm going to implement or
20 these are your new terms that I'm going to now just do. And
21 that's legal.

22 Now, you also have the option to strike. If a final offer
23 is rejected, a strike vote would be taken. Most of you don't
24 want to go on strike. But if you do, you'd have the right to
25 vote for that. Or the Employer Billy, it's a pressure tactic

1 to make the -- to kind of knock some sense into the Union, and
2 they can lock you out. That's Billy's leverage. He says look,
3 in negotiations, we're not getting anywhere. We're not coming
4 to an agreement. You're not going on strike or he finds out
5 you may be going on strike next week and in order to protect
6 his own business, he'll lock the doors on all of you. That's
7 absolutely legal. That's his pressure tactic that he has to
8 make sure the Union agrees to his terms.

9 So I'll tell you what happens in lockout or in strike.
10 Meaning that your Employer can do certain things and the Union
11 can -- sorry, you get certain things as a result. And we
12 showed you this last time, right? Once both parties, the Union
13 and Billy, have reached an impasse meaning a deadlock they
14 can't agree, Billy may implement unilateral changes, right, if
15 they've been previously proposed. That's what the last, best
16 and final offer is. He says, okay, I'm just going to -- this
17 is it. This is your new contract that we're working under.
18 It's not going to be what you want. But that's going to be
19 what you get.

20 So if the company says no, what's the Union's ultimate
21 weapon? We've been going over this. I've been hinting at this
22 to you. You may have seen it in other places. You go on
23 strike. Now, had the Union or its supporters told you that you
24 don't have to worry about a strike. Don't worry. This Union
25 doesn't do it. We won't force you to go out on strike. If

1 that's the case, if you do not go on strike, you have to be
2 very, very concerned over what the terms are in your agreement.
3 If there's no legitimate threat to Billy to compromise in
4 negotiations, he can just run all over you. Why would he
5 change his terms if you're going to come to work anyway?

6 So a Union's bargaining power depends on three things.
7 First, is the right to strike, meaning are you in negotiation?
8 The ability to strike effectively and the company's ability to
9 withstand a strike. What striking comes down to is who can
10 last longer? Can the employees last longer collecting no
11 wages, no benefits, no insurance, you can't go on unemployment
12 insurance because you are choosing not to come to work. Or can
13 Billy. It's a no brainer, right? Generally, who withstands
14 the strike? When people struck at Wal-Mart, did Wal-Mart go
15 out of business? No. When there were strikes at, you know, US
16 Foods threatens to strike all the time, did US Foods go out of
17 business? Right, these are considerations. Who has deeper
18 pockets? Who can laugh during the strike while (indiscernible)
19 that's your negotiating power.

20 A strike should not be undertaken lightly for the strike
21 is the ultimate economic weapon and it can backfire. Meaning
22 that when you decide you're going to strike, you don't know
23 what you're getting into. You don't know when it's -- how long
24 it's going to last. It could last one day, it could last a
25 year. And I'll show you the Union's -- the UFCW's record on

1 striking. This is from another Union strike manual, right.
2 They even tell their own members that they have to be cautious,
3 they have to be careful about the idea of striking. So how
4 often does the UFCW strike? We pulled the records and this is
5 in a 20-year period from January 1995 to March 31st, 2015, just
6 this year. Here's the total number of work stoppages called;
7 177 in 20 years. So you know, if you average that out, you
8 know, you're looking at about one strike per year (sic), a
9 little less, right? But you can't have a partial strike.

10 Now, here are the number of employees affected during this
11 time. 195,000. Number of days lost. 13,000. You know,
12 they're lasting about, you know, anywhere between like I said a
13 couple days here or, you know, months of striking.

14 Now, they calculate the total number of workdays lost and
15 then if you say look, that's 20 years ago, right? Even though
16 I listed to you how many there were per year, how many are
17 ongoing? From two -- there are none in 2015. None this year.
18 There's still a work stoppage going, one current work stoppage
19 from 2014. Meaning that they're still not at work. So it's
20 been potentially a year already that those people haven't been
21 working. That's a long time.

22 How long can you survive without getting paid? I don't
23 know. I showed you, you know, they said okay, strike benefits,
24 you know, we offer strike benefits that you get paid during the
25 time of strike. Well remember I showed you their financials

1 from last year. They paid zero in strike benefits. So all
2 these employees, a hundred employees that are still, you know,
3 not working, are they receiving benefits? They did not.
4 Because the disbursements were zero dollars. And I can show
5 you that again if you want to see it.

6 On average, you're going to lose 1.9 percent of what you
7 make per year for each week you're on strike. So if you think
8 about it this way, if you lose two percent every week of your
9 total annual pay, and let's say you get that dollar raise you
10 wanted, let's say you get that two dollar raise you wanted,
11 whatever it is, how long is it going to take you to recoup
12 that? It could take you two years. You know, I don't know
13 what each and every one of you make. So you'd have to do that
14 calculation on your own and figure out, okay, how much am I
15 losing? How much do we now have to make to make this worth it?

16 And like I said, no wages, benefits, unemployment
17 insurance, and they can permanently replace you. Meaning when
18 you're on strike, the government doesn't force Billy to go out
19 of business. He can hire a replacement.

20 You now don't have health insurance. So here are the
21 current COBRA rates. COBRA is the government plan you can go
22 on if you currently don't have a job. Anyone who doesn't have
23 a job can apply for COBRA. Well, if it's just you, you're
24 paying about \$544 per month, 342, but remember, there's nothing
25 coming in. You still have bills to pay. House payment, car

1 payments, health insurance, children, right? These are very
2 expensive plans.

3 Now, do you get the final say? Do you get to vote? Do
4 you get to choose whether you go on strike? And the answer's
5 no, you don't get to choose ultimately. And here's why. The
6 local shall engage in the strike -- no local, I'm sorry, so
7 Local 99 cannot go on strike without first receiving
8 authorization, permission from the International Union. That's
9 how it works. They'd have to talk to their bosses and say we
10 want to go on strike, can we? And they're given permission or
11 not. How will they pay, right? How much are you entitled to
12 strike benefits? Last year was zero.

13 But it really depends on the Union. So I pulled up their
14 rules, right? And it says first of all, even if it's
15 authorized by the International Executive Committee,
16 disbursements when made will be determined by that committee,
17 right? So it's not up to you. It's not up to the local.
18 It's up to their superiors on the international level.

19 Here's what they say. Financial aid meaning they won't
20 pay you unless you've been on strike for more than 14 days,
21 right? That's what it says. They will not be payable for the
22 first seven days. You've already lost out one week. One week
23 of pay is guaranteed that you will not make. From that, if you
24 haven't been locked out or on strike for 14 days, two weeks, in
25 the possession, meaning every single day you're out there

1 picketing, you don't get paid.

2 Now, we gave -- so you know, we gave you a letter
3 yesterday, right, with guarantees to say look, we will -- both
4 Ricardo and I will be having a very different story for you if
5 you can get something in writing. If they will sign a paper
6 saying that they guarantee that you will never be on strike or
7 that if you do go on strike, they will pay you what you make
8 now, then I'm going to have a very different idea. Then you
9 got it in writing.

10 Just so you know, you know, the Union representative was
11 here last night and a couple employees approached the Union and
12 said, will you sign this. Part of that was on strike, part of
13 it was you're promising me, you know, two, five, ten dollars
14 more per hour. All this great stuff. Put it in writing.
15 Guarantee me you can get me one penny more than you give me
16 now. Well, they said that they could not sign that. Why can't
17 they sign it? They don't have the power to. Like I've been
18 telling you all along, I'm not surprised they didn't sign it.
19 They can if they're willing to dig into their own pocket and
20 give to you. Why would they do that? They don't work for
21 free.

22 So if the Union calls a strike, can the company replace
23 me? And they can. They can permanently replace you. This is
24 entirely legal for the entire duration of the strike. Well,
25 the Union says we can't be fired for going on that strike. Is

1 that right? And there's a distinction. You can't be fired, but
2 you could be permanently replaced. Same effect to you, right?
3 You're still not working. And why is that? Well, if you're
4 permanently replaced, people take your job, you have to make an
5 unconditional offer to return. What an unconditional offer is
6 is that you say no matter what you decide, Stern, I will take
7 my job back. If that's for less money now, less benefits, I
8 lose my status, right, I've lost my route, I've lost everything
9 I have, I'm starting from scratch. That's an unconditional
10 offer. No matter what your terms are, I will return to work.

11 You have to make that to get your job back. You must be
12 qualified. If for some reason, Stern decides that okay, we
13 have stricter requirements for hiring new employees. Then you
14 are now subject to those rules.

15 And many of you have told me, right, you know, there are
16 you know sometimes part of this is background checks. It's all
17 negotiable. So it doesn't have to clearly mean that. But I
18 know a lot of you were given a chance by Billy. Is the Union
19 going to be as motivated to do that as well? I don't know.
20 Get it in writing.

21 Now, you will be put -- so the people that come and
22 replace you can stay if they want. If they like the job, they
23 can stay. So as they leave, as they quit or they decide to get
24 another job, then those of you will be put on what's called a
25 preferential recall list. Meaning that as jobs, new jobs open,

1 those of you who are out on strike will be called, you know,
2 hey, Lynette, do you want your job back? Jose, do you want
3 your job back? Larry, you know, as job openings happen.

4 They don't have to make room for you. And here's the law,
5 right. I'm not going to read all the language. But just
6 showing you that that's how it works. Now, as a member of the
7 Union, what if you don't want to risk being replaced? And you
8 want to come to work and cross the picket line? What happens?
9 You have to be careful because now you're violating the Union's
10 rules. And here are their rules. No member shall cross the
11 picket line if they've established it. If you cross, you will
12 be disciplined. What we're used to seeing is you are fined one
13 dollar for every dollar you make while on strike. So just to
14 show you, this employee, the strike happened, and the local
15 decided that crossing the picket line was a violation and they
16 have estimated that the amount this employee owed them was
17 \$16,640.40. A dollar for every dollar you earn.

18 So if you make, you know, let's just say you make maybe a
19 hundred dollars per day, each day you cross the picket line,
20 you owe the Union \$100. So you're working for free. And in
21 that time, there's a lot of pressure, right? Remember, I
22 showed you the charge with the government that -- when they
23 were on strike, they encouraged people to get violent for those
24 who wanted to cross the picket line and come to work. That's
25 scary, right? Just for wanting to do your job.

1 So here's what I'm talking about. Okay. Some employees
2 say well, you know, we're not going to go on a formal strike.
3 We're just going to surprise our Employer and just not show up
4 to work one day. Well, that happened, right, Billy can do
5 something else. And I mentioned it. It's called lockout. In
6 these cases, you know, it's not the Union saying you're going
7 out on strike. It's Billy saying I'm closing the doors.
8 Union, I want you to agree to my terms. So I'm shutting down
9 my facility. Getting permanent replacements. Because I don't
10 want to deal with all this stuff.

11 And the Union then is more likely to sign that last, best
12 and final offer. Because they need you to work, the Union
13 needs you to work so that they can get paid. So that they can
14 collect dues.

15 And here's the law just so you know. If you're wondering
16 where I'm getting this, I'm not making this information up.
17 It's legal. The Employer could lock you out and you have the
18 ability to strike.

19 UNIDENTIFIED SPEAKER: But it also depends on the strike
20 if they're going to. Remember, there are two steps to strike,
21 that one you're talking about. That you're referring to.

22 MS. PENN: Yeah.

23 UNIDENTIFIED SPEAKER: And then there's another one that
24 we can go and strike for four or five hours or whatever.
25 Remember, I used to be in the Union.

1 MS. PENN: Yeah, sure.

2 UNIDENTIFIED SPEAKER: And we're going to go in as a unit
3 so --

4 MS. PENN: Yeah, these are economic tricks. I'm only
5 talking about in collective bargaining negotiations.

6 UNIDENTIFIED SPEAKER: Right, right, yeah.

7 MS. PENN: Right after a contract is negotiated, yeah,
8 that's called a work stoppage, right. Not necessarily called
9 striking in terms of the government. It's called a work
10 stoppage for four or five hours, sure. Absolutely. But do you
11 think that you can't be replaced during that time?

12 UNIDENTIFIED SPEAKER: I can, that's --

13 MS. PENN: Those four or five hours.

14 UNIDENTIFIED SPEAKER: I sure can.

15 MS. PENN: Yeah.

16 UNIDENTIFIED SPEAKER: I'm not saying that it won't
17 happen, but again --

18 MS. PENN: Sure.

19 UNIDENTIFIED SPEAKER: -- there's a 50/50 chance so.

20 MS. PENN: Well, that's the work stoppage you're talking
21 about is after a contract is signed, right? So at, you know,
22 I'm trying to think of a local represented company. Fry's, for
23 instance, right? If you go to Fry's, and a contract's already
24 negotiated and you say look, we want a term, wages or whatever,
25 to be renegotiated, that's a different action. Different laws

1 apply. I'm talking about the first choice you have, right? In
2 deciding whether you want -- because you have a choice now.
3 There's no existing contract here. At Fry's or somewhere you
4 were working, the Union was already there. For this, you get
5 to choose. Knowing all that, knowing that you could go on
6 strike for a contract or knowing that you could have work
7 stoppages later for four or five hours every day, whatever it
8 is, is that a risk you want to take?

9 But in the beginning, to force contract negotiation, it is
10 not four or five hours. You are completely withholding your
11 labor. That's why it's called an economic strike. And there's
12 actually a third type of strike. And it's called a strike for
13 recognition. That's so that -- that happens before this
14 process. So there are three strikes. Strike for recognition,
15 meaning that you are looking to -- you signed authorization
16 cards, right, in the beginning and the Union bypasses your
17 vote. There's no election day. They are able to, if they have
18 65 percent of your signatures, they are able to demand
19 recognition from Billy. Billy doesn't have to say yes. But
20 that's what a strike for recognition is, before you're
21 represented.

22 This is the middle stage, the economic strike. Meaning in
23 negotiations, how -- what's your leverage? What are we doing
24 here? We are now -- we voted for representation. We are
25 working without a contract. We are striking for economic

1 reasons because we're getting paid zero, right? And we want a
2 contract signed. That's economic strike.

3 And then what you're talking about is the third, after
4 you're already represented, right? So yes, it is absolutely
5 possible. Work stoppages like I showed you their records are
6 striking or that four or five hours a day. Or however long you
7 work. However long they say you're going to picket.

8 So, right, this is ultimately your choice. You're going
9 to be voting. I don't go in the voting booth. Billy doesn't
10 go in the voting booth. Your managers aren't there. This is
11 you. Only you know, you know, what you -- what's in your best
12 interests. And it's your future, right? And I encourage you
13 all to get the facts before you cast your secret ballot.
14 Exercise your right because that's your voice.

15 And again, we will keep reminding you of this Thursday,
16 November 5th day. So are there any other questions? I know
17 one was already asked about striking. Any other questions?

18 Not from you? Okay. Well, you know how this works. You
19 know where to find us. If stuff comes up, Ricardo and I are
20 both available. So but just to let you know, right, I'm always
21 encourage --

22 UNIDENTIFIED SPEAKER: (Indiscernible).

23 MS. PENN: Oh, yeah.

24 UNIDENTIFIED SPEAKER: Do you got paid for do this kind of
25 work, right? You got paid?

1 MS. PENN: Yeah, I don't work for free.

2 UNIDENTIFIED SPEAKER: All right.

3 MS. PENN: Just like you don't work for free. Right.

4 (Simultaneous conversations)

5 UNIDENTIFIED SPEAKER: Like I said, keeping it simple, why
6 Billy he don't want the Union, you know what I mean? What --
7 because (indiscernible) special not to stop (indiscernible)
8 why?

9 MS. PENN: Yeah.

10 UNIDENTIFIED SPEAKER: Why he don't want to go --

11 UNIDENTIFIED SPEAKER: Are we done with this meeting? Can
12 you answer his question and we can go?

13 MS. PENN: Yeah, he probably wants everyone to hear,
14 right? I mean other people are wondering the same thing. So
15 if you just bear with me for a second, I can answer his
16 question so that all of you in here can hear. So why is he --
17 you're saying why is he scared, right?

18 UNIDENTIFIED SPEAKER: Right.

19 MS. PENN: He's not scared.

20 UNIDENTIFIED SPEAKER: Okay.

21 MS. PENN: He's concerned. And he doesn't want to be put
22 in the situation where he is negotiating against your
23 interests. Because remember, Billy's not going to be
24 bargaining with himself. The Union doesn't bargain with their
25 wages and benefits. The Union still gets paid, too. What goes

1 on the negotiating table are your wages, your benefits, your
2 hours, your overtime, your everything. So if you put Billy in
3 that arena where he has to bargain tough, he will. He's going
4 to make sure that his business survives. He doesn't want to
5 have to. Look at all the stuff he has done for, you know, many
6 of you in here. Many of you, you know, were given a second
7 chance by him at one point or another. You've gone to him,
8 asked for loans, you've asked for him to change your schedule,
9 meaning that, you know, my, you know, my family -- I have a
10 family emergency. Or now I'm injured, I want, you know, can
11 you give me light duty. Those types of things, right.

12 Now he's going to be in a situation where he's going to
13 bargain tough against you. If that's the road you want to go
14 down. And so if you put him in that, you know, that ring,
15 right, like a boxing match. If you put him there, he's going
16 to fight. He doesn't want to be there. Because he wants to
17 make sure that he can do what's best for the company and the
18 company is you.

19 UNIDENTIFIED SPEAKER: If that's the case, you want to do
20 what's good for us, why are we here then?

21 MS. PENN: Right, no, no, no. I get that.

22 UNIDENTIFIED SPEAKER: No, wait. No, the question is why
23 are we here? We shouldn't even be here then if it was that
24 good, right?

25 UNIDENTIFIED SPEAKER: Yeah.

1 UNIDENTIFIED SPEAKER: Somebody had to bring something up
2 to get this going on.

3 MS. PENN: Sure. I'm not saying that everything is great.

4 UNIDENTIFIED SPEAKER: That's right.

5 MS. PENN: These situations like Ricardo and I have told
6 you, you don't go to sleep one night when everything's perfect
7 and say, you know what, I'm going to go file a petition, you
8 know, and want to be represented by the Union. That doesn't
9 happen. So we know there are issues. But like I told you
10 before, that's not your -- that's not what's on the ballot.
11 You're not voting whether there are issues here or not. You're
12 voting whether you want Local 99 to be your exclusive
13 representative.

14 UNIDENTIFIED SPEAKER: No, you're not understanding what
15 I'm saying though.

16 MS. PENN: I get what you're saying.

17 UNIDENTIFIED SPEAKER: If --

18 MS. PENN: But there are issues, right? The reason why
19 you went to this point that there's a petition here, there's a
20 vote set, is because there were issues leading up to that
21 petition, right?

22 UNIDENTIFIED SPEAKER: If everything was being taken care
23 of right, we wouldn't be here.

24 MS. PENN: And it wasn't. Right, it wasn't. That's the
25 bottom line.

1 UNIDENTIFIED SPEAKER: On whose head then?

2 MS. PENN: Obviously, the Employer.

3 UNIDENTIFIED SPEAKER: Right?

4 MS. PENN: Yeah. No, I'm not disagreeing with you. I
5 told you in the beginning, right, I don't work for Stern. I
6 know there are issues here and many of you have come to talk to
7 me to express what those issues are. But Billy can't do
8 anything right now, right? This is his wakeup call. He talked
9 to some of you yesterday morning. You heard him. You know,
10 he's saying, give me one shot. Stuff went wrong. I see that
11 now, you're coming and talking to me about it. Give me one
12 shot to fix it and if I don't, you have other alternatives.
13 The Union is going to be there. They're not going to say,
14 Larry, I'm not going to accept \$60 from you to fail. To
15 negotiate less for you, to not quite represent you the way you
16 want me to. They're going to take that \$60 a month.

17 I've seen it happen in the past.

18 UNIDENTIFIED SPEAKER: Are we just giving away 60 bucks
19 and still in the same stinking boat; is that what you're
20 saying?

21 UNIDENTIFIED SPEAKER: Well, it might even be worse.

22 MS. PENN: Yeah, it could be worse.

23 UNIDENTIFIED SPEAKER: If he goes down to the best offer,
24 you know, the final and best offer, we might not get crap. I
25 mean we'll be lucky if we make minimum wage if he goes that

1 far. But the thing is with this Union, it's after if we vote
2 it out, then Billy's got a year to make some changes. To start
3 giving us raises, start giving us --

4 MS. PENN: Here's another option, John.

5 UNIDENTIFIED SPEAKER: -- you know.

6 MS. PENN: If the Union withdraws, Billy has a shorter
7 timeframe. So if the Union were actually interested in your
8 best interests, right, they would say you know what, we're
9 going to withdraw the petition because then they can come back
10 in six months. That's a short -- you can give them a shorter
11 lease and that takes one call from the local unions to the
12 government agent.

13 UNIDENTIFIED SPEAKER: (Indiscernible).

14 MS. PENN: So you don't want to be here. I can't hear
15 you. Sorry.

16 UNIDENTIFIED SPEAKER: Who's going to assure me that I
17 will have a job tomorrow if I give Billy a chance?

18 MS. PENN: No one can.

19 UNIDENTIFIED SPEAKER: Exactly. See.

20 MS. PENN: Not the Union either. But you pay the Union.

21 UNIDENTIFIED SPEAKER: You would have better chance if the
22 Union come in and (indiscernible).

23 MS. PENN: And that's your decision, right. If you feel
24 you have a better chance, that's your own thing. I think from
25 all the information we presented, job security for instance,

1 they're not -- if you get fired, is the Union going to have
2 your back?

3 UNIDENTIFIED SPEAKER: It all depends. I mean there's got
4 to be a good reason for why anyone's going to get fired.

5 MS. PENN: Not necessarily, right.

6 UNIDENTIFIED SPEAKER: It has to be. Usually.

7 MS. PENN: There's at will -- no, there's at will
8 employment in every state. Right. You can quit at any time
9 and you can be fired at any time. That's the law. That's the
10 law we're working with regardless of whether you're a Union
11 member or not.

12 UNIDENTIFIED SPEAKER: (Indiscernible) do whatever they
13 want.

14 MS. PENN: But you know what your job security is, your
15 customers. That's your job security. And when this Union's
16 going to your customers harassing them now, you know,
17 yesterday, I think the Union representative said well, I didn't
18 know any of that was going on. If the left hand doesn't know
19 what the right hand is doing, why do you want to be represented
20 by that group? Right? If someone can do one thing and another
21 person can do something, and then that's okay with you, how are
22 they going to negotiate a contract for you?

23 So they even went as far as to say, you know, that they
24 weren't visiting people at their home. And I know that is 100
25 percent not true. Many of you have been visited at your homes

1 because you have told me. I don't know that they've come to
2 your houses. And they denied that. So it comes down to
3 credibility, right? I mean if you decide the Union's more
4 credible, that they're going to fight for you, that they're
5 going to get you more, then there's nothing really I can say to
6 you.

7 But what I encourage you to do is take into account all of
8 this information and what's the worse that can happen? Okay.
9 Union withdraw. Billy, now you have six months. Because if
10 the vote's no on election day, the Union can't come back for a
11 year. Now Billy has a year to work on things. So how long do
12 you want him to have? That's your choice. And it actually,
13 you know, oftentimes you will go to the Union and say, we want
14 you out. We don't want to be -- give us -- we wanted to have
15 one shot with Billy. Give us six months. You know, withdraw
16 the petition.

17 You can't do it. In Portland, Oregon, Ricardo and I had a
18 client where the employees went to the government, the local
19 NLRB office, and said we want you to withdraw the petition.
20 They said who are you? Oh, we're the ones that, you know,
21 signed the authorization cards for Local 99. And they said
22 well, where is the Local 99 president? They said you are not
23 the Union. They're telling you now you have control. You have
24 -- you can control your fate, your destiny, your wages, your
25 benefits, your overtime, everything. Call the government and

1 ask them. Right? There are government agents that will take
2 your call and ask them, are we the Union as employees? If I
3 wanted to withdraw the petition, if I got enough signatures,
4 could we do it? They're going to tell you no. Only the Union
5 president can. That's it.

6 So even if you ask them to withdraw it, look, let's give
7 Billy six months. See what they say? They may say yes. But
8 if they say no, then you're also stuck. Do you have a voice?
9 You may think you do. Test it. Push it. See if there -- you
10 know, they can put their money where their mouth is.

11 It's up to you, right? That's something that you have to
12 decide for yourself each and every one of you.

13 So anyway, I have to get you guys back to work. But
14 please continue asking the tough questions and Ricardo and I
15 will be here. Thank you, all, very much.

16 UNIDENTIFIED SPEAKER: Thank you.

17 (Recording concludes)

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CERTIFICATE

I certify that the foregoing is an accurate transcript,
produced to the best of my ability, from the electronic sound
recording provided by the ordering party.

Dated: September 1, 2016

Dianna Aldon

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